FREE COPY

FILED
SEP 1 - 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. 3[illegible]

THOMAS W. SMITH, JR.,
Petitioner,

against

JOHN T. McLANE, JOSEPH L. McLANE, JOSIE E. McLANE, NELL McLANE ARMSTRONG, CYNTHIA McLANE, LOUISA A. McLANE, MARY E. McLANE, individually; JOSIE E. McLANE and JOSEPH L. McLANE, Trustees; PEOPLES CITY BANK, NATIONAL BANK OF McKEESPORT and UNION NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
Attorneys for Petitioner,
One Wall Street,
New York 5, N. Y.

Dated, August 31, 1949.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI:

I—Summary Statement of the Matter Involved 2

II—The Basis Upon Which it is Contended that this Court has Jurisdiction 8

III—The Questions Presented 9

IV—Reasons Relied Upon for the Allowance of the Writ 10

BRIEF IN SUPPORT OF PETITION:

STATEMENT 13

POINT I—The decision of the Third Circuit Court of Appeals in applying, *sponte sua*, against petitioner the doctrine of unclean hands is in conflict with decisions of this Court upon a federal question, in conflict with decisions of other Circuit Courts of Appeal and this Court upon the same matter and in conflict with fundamental principles of equity and procedure followed in Federal Courts 16

POINT II—The decision of the Third Circuit Court of Appeals that it could not and would not redetermine the credibility of the witnesses is in conflict with decisions of other Circuit Courts of Appeal on the same matter 24

POINT III—The Circuit Court has not properly applied the rules as to the scope of appellate review in federal courts in equity cases and its decision in this respect is in conflict with the Federal Rules of Civil Procedure, applicable decisions of this Court and decisions of other Circuit Courts on the same matter 28

CONCLUSION 31

Table of Cases Cited

PAGE

Adam Hat Stores, Inc. *v.* Lefco, 134 F. (2d) 101, 103 (C.C.A. 3rd, 1943) 29

American Cooperative Serum Assn. *v.* Anchor Serum Co., 153 F. (2d) 907, 912 (C.C.A. 7th, 1946) 23

Bergeron *v.* Mansour, 152 F. (2d) 27, 32 (C.C.A. 1st, 1945) 18

Bethlehem Baking Company *v.* United States, 129 F. (2d) 490, 491 (C.C.A. 3rd, 1942) 29

Carter *v.* Powell, 104 F. (2d) 428, 430 (C.C.A. 5th, 1939), cert. den. 308 U. S. 611 18

Carter Oil Co. *v.* McQuigg, 112 F. (2d) 275, 279 (C.C.A. 7th, 1940) 26

Comstock *v.* Thompson, 286 Pa. 457, 461, 462; 133 Atl. 638 (1926) 21

Container Patents Corporation *v.* Stant, 143 F. (2d) 170, 172 (C.C.A. 7th, 1944), cert. den. 323 U. S. 734 18

Demster *v.* Baxmyer, 231 Pa. 28; 79 Atl. 805, 808 (1911) 21

Equitable Life Assur. Soc. *v.* Irelan, 123 F. (2d) 462, 464 (C.C.A. 9th, 1941) 26

Erie R. Co. *v.* Tompkins, 304 U. S. 64 (1938) 19, 22

Fleming *v.* Palmer, 123 F. (2d) 749, 751 (C.C.A. 1st, 1941) 29

Fountain *v.* Filson, 336 U. S. 681, 683; rehearing denied 336 U. S. 921 (1949) 19

Frazier *v.* Mansfield, 305 Pa. 359, 363; 157 Atl. 798 (1931) 21

Goldie *v.* Cox, 130 F. (2d) 695, 715 (C.C.A. 8th, 1942) 18

Guaranty Trust Co. *v.* York, 326 U. S. 99 (1945) 20

Halladay *v.* Faurot, 8 Ohio Decisions Reprint 683 (1883) 23

PAGE

Hays' Estate Nat'l. Bank's Appeal, 159 Pa. 381, 383; 28 Atl. 158 (1893) 21

Hercules Powder Company *v.* Rich, 3 F. (2d) 12, 19 (C.C.A. 8th, 1925), cert. den. 268 U. S. 692..... 18

Jones *v.* Tower Production Company, 120 F. (2d) 779, 782 (C.C.A. 10th, 1941)..... 18

King *v.* Order of Travelers, 333 U. S. 153 (1947)..... 19

Klaxon Co. *v.* Stentor Co., 313 U. S. 487, 496 (1941); reversing 115 F. (2d) 268 (C.C.A. 3rd, 1940)..... 22

Lewis & Nelson's Appeal, 67 Pa. 153, 166 (1870)..... 21

Luckenbach S. S. Co. *v.* United States, 157 F. (2d) 250, 251 (C.C.A. 2d, 1946)..... 26

McClanahan *v.* McClanahan, 79 Ohio App. 231, 235, 236 (1946) 23

National Labor Relations Board *v.* Fickett-Brown Mfg. Co., Inc., 140 F. (2d) 883, 884 (C.C.A. 5th, 1944) 23

New York Life Ins. Co. *v.* Calhoun, 114 F. (2d) 526, 543 (C.C.A. 8th, 1940), cert. den. 311 U. S. 701 17

Percy A. Brown & Co. *v.* Raub, 357 Pa. 271, 291; 54 Atl. (2d) 35 (1947)..... 21

Plack *v.* Baumer, 121 F. (2d) 676, 678 (C.C.A. 3rd, 1941) 29

Ruhlin *v.* New York Life Ins. Co., 304 U. S. 202 (1938) 20

Scottwood Realty Co. *v.* Bowman, 21 Ohio App. 244, 249 (1926) 23

State Farm Mut. Automobile Ins. Co. *v.* Bonacci, 111 F. (2d) 412, 415 (C.C.A. 8th, 1940).....26, 29

Stokes *v.* United States, 144 F. (2d) 82, 85 (C.C.A. 2nd, 1944) 25

United States *v.* LeBaron, 60 U. S. 73, 77 (1856)..... 18

United States *v.* U. S. Gypsum Co., et al., 333 U. S. 364 (1948) 28, 30

Statutes Cited

PAGE

Federal Rules of Civil Procedure, Rule 52(a) 10, 11, 27
Judiciary Act of 1789, §34, R.S. §721, 28 U.S.C. §25, Title 28, §1652 19
Title 28 U. S. Code, entitled "Judiciary & Judicial Procedure," Sec. 1254 (Public Law 773, Chap. 646, 80th Cong., 2nd Sess.) 8
Revised Rules of the Supreme Court of the United States, Rule 38, para. 5(b) 8, 9

Authorities and Miscellaneous Cited

4 A.L.R. 32, 44, 58-9 21
Pomeroy's Equity Jurisprudence, 5th Ed. Vol. 2, §399 .....17, 20, 21, 23
Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives; Hearings of March 7, 9 and 11, 1949 6
Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harv. L. Rev. 70, 88 29

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

THOMAS W. SMITH, JR.,
Petitioner,

against

JOHN T. McLANE, JOSEPH L. McLANE, JOSIE E. McLANE, NELL McLANE ARMSTRONG, CYNTHIA McLANE, LOUISA A. McLANE, MARY E. McLANE, individually; JOSIE E. McLANE and JOSEPH L. McLANE, Trustees; PEOPLES CITY BANK, NATIONAL BANK OF McKEESPORT and UNION NATIONAL BANK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas W. Smith, Jr., respectfully represents to this Court:

I

Summary Statement of the Matter Involved.

This is an action in equity brought, on the ground of diversity, in United States District Court for the Western District of Pennsylvania, by petitioner Thomas W. Smith, Jr., beneficiary of a trust, against respondent John T. McLane, a trustee, who had violated his trust (36a-38a).* The corpus of the violated trust constituted the controlling shares of stock of The Sun Rubber Company, an Ohio corporation, of which both said beneficiary and said trustee were and are directors, officers and stockholders (52a, 53a, 54a; Pl. Ex. 1, 551a). The trustee violated his trust by misapplying trusteed stock and by pledging said trusteed stock to secure his individual indebtedness. He designated himself as "donor" and members of his family as "trustees" in documents set up for the latter purpose (21a; 38a; 54a-55a, 63a; 59a-64a; Pl. Exs. 19 and 20, 594a-600a; 349a-358a).

The complaint alleged that on discovery of McLane's breach of trust and hypothecation of trusteed stock, petitioner objected because of the trust breach and the resulting harm to his beneficial interest therein and the welfare of The Sun Rubber Company and, being unheeded, he left The Sun Rubber Company and accepted employment elsewhere; that petitioner was thereafter induced by McLane to return to Sun Rubber by an oral settlement agreement made between them at Akron, Ohio on June 24, 1937 (38a-39a) whereby there would be established forthwith, and maintained thereafter during the life of the trust, a parity of their stock holdings and bene-

* References are to pages of the record unless otherwise noted.

ficial interests in trusteed stock in The Sun Rubber Company as between McLane and his immediate family and petitioner and his immediate family and by McLane's partial performance of that agreement on that day by establishing a then present parity.* The complaint further alleged that thereafter this parol settlement, parity agreement was breached by the trustee by his secret acquisitions of such stock and beneficial interests from others (39a-40a).

Petitioner sought, in equity, an accounting of the trust administration and of the shares of trusteed stock wrongfully pledged by the trustee and specific performance of the parity agreement (42a-43a).

The case was tried before District Judge Nelson McVicar, without a jury. During the course of trial, when the subject of the trustee's maladministration of the trust was about to be developed, counsel for respondents conceded that the Court should order an accounting and consented to an accounting as prayed for in the complaint (365a-366a). Judgment entered after trial directed a full trust accounting (637a). The accounting phase of this case is pending in the District Court awaiting the appointment of a Master to take evidence thereon.

On the trial petitioner testified to the making of the parity agreement between McLane and himself on June 14, 1937 at Akron, Ohio (108a-109a; 138a-140a) and to the reiteration and confirmation of that agreement by both of them later that same day before Rev. Dr. LeRoy Lawther, their mutual friend since 1921, former pastor and spiritual adviser, in his study in Lakewood Presby-

* It was also agreed between them that the trustee would forthwith spell out and make a declaration of the interests of the ultimate beneficiaries of the trusteed stock.

terian Church, Lakewood, Ohio (136a-141a). Respondent McLane testified that the alleged parity agreement had never been made (383a-384a). Rev. Dr. Lawther testified, *on deposition*, that the parity agreement had been reiterated and confirmed in his presence by both petitioner and McLane, fully corroborating petitioner's testimony (271a-279a). *He was the one real key witness in the case.* Respondent did not question his integrity or veracity (538a). Also testifying *on deposition*, other substantial, disinterested key witnesses for petitioner corroborated the existence of the parity agreement and the partial performance thereof by McLane (242a; 267a-270a; 232a; 262a; 204a; 295a). The veracity and integrity of these witnesses, likewise, was not questioned by respondents (538a).

Concededly, late on that same day, a declaration of the ultimate distribution of the trusteed shares to the trust beneficiaries was set up and agreed to by McLane; also "present" parity, as of that date, was established between petitioner and his family on the one hand and McLane and his family on the other by a realignment, in petitioner's favor, of the beneficial interests of McLane and petitioner in the trusteed stock so that each (and his immediate family) had an equal amount (603 shares) of Sun Rubber Company stock, counting their shares held in the trust with those held outside of the trust (Pl. Ex. 6, 558a; 142a).

After parity was thus established "presently" on and as of June 24, 1937, McLane breached the parity agreement by acquiring, without petitioner's knowledge, the beneficial interests in said trusteed stock of the beneficiaries other than petitioner, and other blocks of stock of Sun Rubber Company (Pl. Ex. 16, 588a; 347a; Pl. Exs. 21-29, 601a-612a; 358a; 437a; 465a-466a).

After trial, petitioner's complaint was dismissed with prejudice, except for the trust accounting.

The District Court (73 Fed. Supp. 849; 634a, 636a) held that the alleged parity agreement never did exist, which holding was hinged on the question of the credibility of witnesses. The Court said:

> "Whether this alleged oral agreement was made depends on the credibility of the witnesses who testified that there was such an agreement and the witnesses who testified that there was no such an agreement, the surrounding circumstances and inferences to be drawn from facts proven." (636a)

This finding was in complete disregard of the testimony of Rev. Dr. Lawther, the one outstanding key witness in the case, and the testimony of petitioner's other substantial, disinterested, key witnesses (all of whom testified on deposition), although respondents, expressly, did not question their veracity or integrity (538a). It also ignored petitioner's corroborative documentary evidence and the several acts of McLane in partial performance of the parity agreement, including his establishment of a "present" parity (for which, otherwise, there was no reason or basis).

The trial court erroneously determined, merely as an isolated issue of fact, the parity agreement between the wrong beneficiary and his violating trustee. It refused, over objection, to take or consider evidence of the terms of the trust or its breach and determined the issue of fact as to the parity agreement as *in vacuo*. It ignored the rule of law that the credibility and integrity of a trustee who has violated his trust is impaired. It ignored that in the making of the parity agreement a beneficiary was dealing with a trustee in respect of a violation of trust and that

such a trustee is duly bound to make a fair agreement in respect of his trust violations and had the burden of showing fairness in his treatment of the beneficiary.

His motion for retrial having been denied (638a-639a, 644a; 75 Fed. Supp. 219), petitioner appealed from that part of the judgment to the Circuit Court of Appeals.

That the decision of the District Court was clearly erroneous and against the great weight of evidence is apparent from a review of the entire record. It is equally apparent that in reaching its conclusion, the trial court had engaged in and followed a judicial process which was entirely unreasonable and destructive of equity and justice.

The situation prevailing in that Court has been the subject of recent inquiry,* and may well explain the treatment and disposition of this case there.

The Circuit Court of Appeals affirmed the judgment of the District Court (174 Fed. (2nd) 819 (C.C.A. 3rd, 1949)); (681-684) on the following grounds:

> (1) Petitioner was guilty of "unclean hands," in respect of other beneficiaries of the trusteed stock, and was, therefore, in no position to come into equity to seek specific performance of the parity agreement or aid as a defrauded beneficiary as against the trustee. This was a new issue, never before raised in the case, and was applied by the Court, *sponte sua.*

---

* (See "Hearings before Subcommittee No. 3 of the Committee on the Judiciary, House of Representatives in respect of bills to authorize additional Circuit and District Judges for the United States Courts, Serial No. 6, Hearings of March 7, 9 and 11, 1949, particularly the statements therein of Hon. Francis E. Walter at pp. 6-8 and Hon. John Briggs, Jr. at pp. 93-4)."

(2) Because of his "unclean hands" petitioner was not entitled to have reviewed on appeal the District Court's failure to take evidence on, to consider and to apply to the factual issue of the parity agreement the trust relationship of beneficiary and trustee and trust principles of law.

(3) The Circuit Court of Appeals will not redetermine the credibility of witnesses, because it is "hornbook law" that an appellate tribunal in a civil suit will not redetermine the credibility of witnesses when the trial judge has had the opportunity to observe the demeanor of the key witnesses upon the stand. (Here, actually he did not have that opportunity.)

(4) The finding of the trial judge is not "clearly erroneous" since it is supported by "ample" evidence and his personal observance on the stand of the witnesses.

Petitioner sought an opportunity to be heard by the Circuit Court of Appeals on the questions raised in its opinion, but his application for a rehearing was denied (686a-694a).

The question of unclean hands had never before been raised in the case and was injected therein by the Court of Appeals on its own initiative without giving petitioner any opportunity of a hearing on the facts or the law. Had he been given the opportunity, he could have shown that this doctrine had no basis in the facts of this case.* The

* Given the opportunity, petitioner readily could have shown that he was completely free of any "unclean hands" as to anyone; that he did not participate in any fraud or breach against other trust beneficiaries but, on the contrary, fought for, protected and supported their

glaring error of the Court of Appeals in "discovering" and applying this principle was undoubtedly caused by its entire misapprehension of the facts bearing thereon and of the true equitable rule applicable to the facts because that issue had never before been raised or litigated on the facts or law.

II

The Basis Upon Which it is Contended that this Court has Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, United States Code, entitled "Judiciary & Judicial Procedure", Section 1254 (Chapter 646, Public Law 773, 80th Congress, 2nd Session); and Rule 38, paragraph 5(b)

---

interests against the trustee's contention that the only beneficiary of the trusteed stock was a McLane Co., Inc. rather than said beneficiaries; that the agreement between them to maintain and establish parity of their own stock interests in Sun Rubber Company was a matter which concerned them alone; that the realignment of their own beneficial interests in the trusteed stock to establish "present" parity was a matter which concerned them alone; that petitioner did no wrong or injury to McLane the trustee and defendant; that if there really was any inequity in the declaration of the ultimate distribution of the beneficial interests of trusteed stock by the trustee, such declaration and distribution was the trustee's duty and was, on his testimony, at his own suggestion; that following the set-up of the distribution declaration, the beneficiaries, other than petitioner, with full knowledge thereof, not only acquiesced in their respective distributive shares but sold their beneficial interests to the trustee and released him from any claims; that no distribution has yet been made inasmuch as the wrongful pledge by the trustee to the banks of the corpus of the trust is still outstanding; that no such beneficiary was actually defrauded or ever claimed to be; that the ultimate distribution, when made, will be fair and just and will injure no one and that at the time of the trial all possible claims of other beneficiaries in respect to the ultimate distribution had been bought by McLane in violation of his parity agreement with petitioner.

of the Revised Rules of the Supreme Court of the United States. Petitioner's time to file this petition has been extended, by order, to September 1, 1949.

III

The Questions Presented.

1. Was it not error for the Circuit Court of Appeals to inject into this case on its own initiative and for the first time, in its decision, the issue and doctrine of "unclean hands" and to apply it against petitioner as a bar to a full and fair review on appeal and to all equitable relief, without petitioner's ever having any opportunity to be heard or to present evidence on that unlitigated issue?

2. Was it not error for the Circuit Court of Appeals to fail to ascertain and to follow the rule of law of the States of Pennsylvania or Ohio (whichever is appropriate under the conflicts of law rule in Pennsylvania) as well as the general rule of law as stated in decisions of other U. S. Circuit Courts of Appeal, that said doctrine of unclean hands has no application whatever to the situation involved in this case?

3. Was it not error for the Circuit Court of Appeals to fail to ascertain the conflict of laws rule prevailing in Pennsylvania in relation to an equity action brought in a federal court in Pennsylvania on the ground of diversity for specific performance of an agreement made between a trustee and a trust beneficiary in Ohio, particularly in the application of the equitable doctrine of unclean hands on the issue of whether petitioner had a right to seek

equity in that federal court for specific performance of that agreement?

4. Did not the Circuit Court of Appeals commit error in refusing to redetermine the question of the credibility of witnesses where, as here, the testimony of the master key witness and of all of the other of petitioner's substantial, disinterested, key witnesses was taken on deposition so that the trial court did not have an opportunity to observe their demeanor on the stand, particularly when, as here, the veracity and integrity of said witnesses was not attacked?

5. Did the Circuit Court of Appeals not commit error in the interpretation and application of Rule 52(a) of the Federal Rules of Civil Procedure by holding that the findings of a trial court cannot be clearly erroneous if they are supported by ample evidence and by refusing to review the question of credibility and the entire record.

IV

Reasons Relied Upon for the Allowance of the Writ.

(1) The decision of the Circuit Court of Appeals in discovering and applying *sponte sua* the equitable doctrine of unclean hands against petitioner upon the appeal in this case is:

(a) In conflict with the decisions of this Court upon a federal question.

(b) In conflict with the decisions of other Circuit Courts of Appeal and of this Court on the same matter.

(c) In conflict with fundamental principles of equity and procedure followed in federal courts.

(2) The Circuit Court of Appeals decision that it, as an appellate court in a civil action, cannot redetermine the credibility of witnesses when, as here, all of petitioner's witnesses (except himself), all of whom were key witnesses, testified on deposition, is in conflict with decisions of other Circuit Courts of Appeal as well as Rule 52(a) of the Federal Rules of Civil Procedure.

(3) The decision of the Circuit Court of Appeals that a finding of the trial court is not clearly erroneous within Rule 52(a) if it is supported by ample evidence, is in conflict with decisions of this Court and with decisions of other Circuit Courts of Appeal on the same matter.

(4) The questions presented here are of substance and importance in relation to the administration of equity and to the legal principles and procedures applicable in equitable suits in the federal courts and to the scope of appellate review and the powers and duties of a federal appellate court on an appeal in an equity suit.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued, directed to the United States Court of Appeals for the Third Circuit, in respect of its judgment affirming the judgment of the District Court, to be reviewed by this Court, and for such other relief as to this Court may seem proper.

Dated: August 31, 1949, New York, N. Y.

THOMAS W. SMITH, JR.,
Petitioner.

By: MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
Attorneys for Petitioner.

Certificate of Counsel

We hereby certify that we have examined the foregoing petition for a writ of certiorari and that in our opinion it is well founded and the cause is one in which the petition should be granted.

Dated: August 31, 1949.

MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

No. .....

THOMAS W. SMITH, JR.,
Petitioner,

against

JOHN T. McLANE, JOSEPH L. McLANE, JOSIE E. McLANE, NELL McLANE ARMSTRONG, CYNTHIA McLANE, LOUISA A. McLANE, MARY E. McLANE, individually; JOSIE E. McLANE and JOSEPH L. McLANE, Trustees; PEOPLES CITY BANK, NATIONAL BANK OF McKEESPORT and UNION NATIONAL BANK,

Respondents.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement

This petitioner seeks review on certiorari to United States Circuit Court of Appeals, Third Circuit, of its affirmance of that portion of the judgment of the District Court, Western District of Pennsylvania, which dismissed petitioner's complaint with prejudice in so far as it sought specific performance of a settlement parity

agreement entered into between petitioner and respondent John T. McLane.

Petitioner was beneficiary and respondent McLane was trustee of a trust which was peculiar in that the shares of stock constituting the corpus thereof involved the control of The Sun Rubber Company, of which petitioner and McLane were officers and directors. When petitioner discovered that McLane had pledged the corpus of the trust to secure his personal loans, he protested and then left the employ of the corporation. McLane, petitioner's uncle, thereupon induced him to return to the corporation upon the making (and partial performance later on that very day) of a settlement agreement with him which involved (1) the establishment forthwith, and the maintenance thereafter during the life of the trust, of equality or parity of their (and their families') respective holdings of stock and beneficial interests of stock of The Sun Rubber Company (so that neither group would gain stock control of the corporation) and (2) a spelling out and commitment forthwith by the trustee of the interests of the ultimate, individual beneficiaries of the trusteed stock.

Petitioner, in the District Court, alleged a breach of the settlement, parity agreement and a violation of the trust and sought specific performance of that agreement and a trust accounting.

Upon the trial, the trial judge ignored the original breaches of trust and excluded the main evidence in regard thereto and refused to consider the relationship of the parties (petitioner as beneficiary and McLane as trustee) in regard to the breach of trust and the settlement agreement. The settlement agreement was treated as an isolated question divorced from its surroundings. The trial court ignored the fact that this settlement parity agree-

ment was reiterated and confirmed by them personally before a clergyman, Rev. Dr. Lawther, whose integrity and veracity was not attacked and who testified on deposition. It also ignored the testimony of petitioner's other corroborative witnesses who also testified on deposition and whose veracity also was not attacked. It limited the question of fact as one solely between petitioner and respondent and did not mention or deal with the factor that said agreement was reiterated and confirmed by them before their "ecclesiastical referee".

The Court of Appeals, in affirming, again ignored the testimony of Rev. Dr. Lawther and petitioner's other witnesses, as though testimony taken on deposition was beyond that Court's power to review or to reappraise; and held that petitioner was barred from equity and from a full and free review on appeal and from the application of trust principles to the factual issue because of his alleged "unclean hands" not as to the trustee but as to other beneficiaries (which question theretofore had never been mentioned or even suggested in the case).

POINT I

The decision of the Third Circuit Court of Appeals in applying, *sponte sua*, against petitioner the doctrine of unclean hands is in conflict with decisions of this Court upon a Federal question, in conflict with decisions of other Circuit Courts of Appeal and this Court upon the same matter and in conflict with fundamental principles of equity and procedure followed in Federal Courts.

"Unclean hands" in this case were first "discovered" by the Court of Appeals and announced in its decision.

That Court, on its own initiative and of its own accord, invoked the doctrine of unclean hands against petitioner and held, because of it, that petitioner "is in no position to come into equity and seeks specific performance of the agreement" (683) and "is in a position where he cannot invoke the aid of a court of equity as a defrauded beneficiary" (684) and is not entitled to have the trust relationship and trust principles applied on an Appellate review to the factual issue of the agreement made between the wronged beneficiary and the violating trustee.

This principle of unclean hands was not pleaded by any defendant in the answer. No issue was presented or tried in respect thereto before District Judge McVicar. It was not urged, presented or even mentioned in the briefs submitted to the trial court. It did not enter into the opinion or decision of the trial judge and he made no finding of fact or law on the subject. It was not urged or mentioned by either side in the briefs filed in the Court of Appeals, although therein respondent McLane urged many reasons why the trust principles should not be

applicable to the decision of the factual issue and why the judgment below should be affirmed.

Petitioner never has been given an opportunity of a hearing in this litigation, either on the facts or on the law, in respect of that principle. If petitioner had been given an opportunity of a hearing on that issue he readily could have shown as pointed out in his annexed petition that there is no basis in fact in this case for the application of that principle, that there is no basis in law for the application of that principle against the petitioner and that the true rule in respect of unclean hands here applicable is that set forth in *Pomeroy's Equity Jurisprudence*, 5th Ed. Vol. 2, §399, *infra*.

The Court of Appeal's *sponte sua* application of the unclean hands doctrine against petitioner here is in conflict with the controlling legal authorities in several respects.

(1) The procedure of injecting that new and unlitigated issue into the decision on appeal—and on that ground not only depriving petitioner of the kind of review on appeal to which he was entitled but also barring him entirely from recourse to equity—is in conflict with decisions of other Circuit Courts of Appeal and of this Court.

It has been held uniformly in those Courts that a defense, question or issue not raised, tried or considered in the trial court can not be asserted or considered for the first time on appeal and that this is particularly so where, as here, the facts concerning that issue were not litigated upon the trial or made the subject of any finding of the trial court. The rule is stated typically in *New York Life Ins. Co.* v. *Calhoun*, 114 F. (2d) 526, 543 (C.C.A. 8th, 1940), cert. den. 311 U. S. 701, as follows:

> "It is the general rule universally applied by appellate courts that courts of review will refuse to consider questions which have not been raised and tried in the trial court. The reasons for such ruling are numerous and varied. One is that in most instances any alleged error might have been corrected or the proper amendment made if an objection had been seasonably interposed, and that if a litigant were permitted to urge any point not going to the merits of the issue, it would give him an opportunity and an incentive to conceal errors during the trial in order that they might be used as grounds for reversal on review, in case the decision below was adverse.
>
> "'• • • 'to permit a party, upon an appeal, to shift his ground so as to present here a question of law, not raised in the trial court, in a case where, had it been presented there, the court might have obviated it by allowing amendments and the introduction of further evidence, might enable him to mislead the trial court and the opposite party, and so, really, to commit a fraud.' "

To the same effect see: *Container Patents Corporation* v. *Stant,* 143 F. (2d) 170, 172 (C.C.A. 7th, 1944), cert. den. 323 U. S. 734; *Bergeron* v. *Mansour,* 152 F. (2d) 27, 32 (C.C.A. 1st, 1945); *Carter* v. *Powell,* 104 F. (2d) 428, 430 (C.C.A. 5th, 1939), cert. den. 308 U. S. 611; *Jones* v. *Tower Production Company,* 120 F. (2d) 779, 782 (C.C.A. 10th, 1941); *Goldie* v. *Cox,* 130 F. (2d) 695, 715 (C.C.A. 8th, 1942); *Hercules Powder Company* v. *Rich,* 3 F. (2d) 12, 19 (C.C.A. 8th, 1925), cert. den. 268 U. S. 692; and *United States* v. *LeBaron,* 60 U. S. 73, 77 (1856).

(2) Moreover, the Court of Appeals had no right, of its own accord or otherwise, to make an order on appeal on

the new issue of "unclean hands" as to which petitioner had no opportunity to present a defense before the trial court. Its procedure in doing so is directly in conflict with the recent decision of this Court in *Fountain* v. *Filson*, 336 U. S. 681, 683 (1949); rehearing denied, 336 U. S. 921 (1949) where, upon granting certiorari and reversing a Court of Appeals this Court stated:

> "For here the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court".

Here, the order on appeal affirming the judgment of the District Court (685) was made on the new issue of "unclean hands" as to which petitioner had no opportunity to present a defense on the facts or on the law either in the trial court or in the appeal court.

(3) The Circuit Court's decision is in conflict with the decisions of this Court under the Rules of Decision Act,* in that it disregarded the law and court decisions of the States of Pennsylvania and Ohio (as well as other leading authorities) which hold clearly that said doctrine of unclean hands is not applicable to the situation involved in this case.

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938) and subsequent cases, particularly *King* v. *Order of Travelers*, 333 U. S. 153 (1947), this Court held that the Rules of

---

* Judiciary Act of 1789, §34, R.S. §721, 28 U.S.C. §25, Title 28, §1652, which reads as follows:

> *State laws as rules of decision.* The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Decision Act commanded federal courts to regard as "rules of decision" the substantive "laws" of the appropriate state, including not only state statutes but also the unwritten law of a state as pronounced by its courts.

This Court frequently has granted certiorari to determine whether a federal court's failure to follow a state court's decision is inconsistent with the Rules of Decision Act. For example, in *King* v. *Order of Travelers, supra,* this Court said (p. 154):

> "We granted certiorari in order to determine whether the Circuit Court of Appeals' refusal to follow the only South Carolina decision directly in point, the decision of a Court of Common Pleas, was consistent with the Rules of Decision Act as applied in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938), and subsequent cases."

This Court has held that the principle of *Erie R. Co.* v. *Tompkins, supra,* is applicable to a suit in equity—especially as to a purely substantive matter such as the doctrine of unclean hands—and that in an equity suit the federal courts must follow the law of the appropriate state (*Guaranty Trust Co.* v. *York,* 326 U. S. 99 (1945) and *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202 (1938).

In this case the Court of Appeals did not follow the controlling decisions of Pennsylvania and petitioner was not even accorded an opportunity to present those decisions.

The true rule in respect of unclean hands, here applicable, is as set forth in *Pomeroy's Equity Jurisprudence,* 5th Ed. Vol. 2, §399, *supra,* as follows:

> "The dirt upon his hands must be his bad conduct in the transaction complained of. If he is not guilty

of inequitable conduct *toward the defendant in that transaction,* his hands are as clean as the court can require.

* * * * *

"The party to a suit, complaining that his opponent is in court with 'unclean hands' because of the latter's conduct in the transaction out of which the litigation arose, or with which it is connected, *must show that he himself has been injured by such conduct,* to justify the application of the principle to the case. *The wrong must have been done to the defendant himself and not to some third party.*" (Italics ours.)

This is not only a general equitable rule established by many authorities (see cases and annotation 4 A.L.R. 32, 44, 58-9) but it represents the law in Pennsylvania as stated by its Supreme Court. (See the following cases: *Hays' Estate Nat'l. Bank's Appeal,* 159 Pa. 381, 383; 28 Atl. 158 (1893); *Comstock* v. *Thompson,* 286 Pa. 457, 461, 462; 133 Atl. 638 (1926); *Frazier* v. *Mansfield,* 305 Pa. 359, 363; 157 Atl. 798 (1931); *Lewis & Nelson's Appeal,* 67 Pa. 153, 166 (1870); *Demster* v. *Baxmyer,* 231 Pa. 28; 79 Atl. 805, 808 (1911); Cf. *Percy A. Brown & Co.* v. *Raub,* 357 Pa. 271, 291; 54 Atl. (2d) 35 (1947).)

(4) Moreover, the Court of Appeals (in barring petitioner from the aid of a federal court of equity to seek specific performance of the parity agreement and as a defrauded beneficiary on the ground of his alleged unclean hands in reference to some third parties) gave no consideration whatever to the conflict of laws question necessarily involved in that issue, as required under the Rules of Decision Act.

The complaint alleged and petitioner's proof showe that the parity agreement, to which the Court of Appeal referred, was made in Akron, Ohio, between the petitione and the respondent McLane and was confirmed in Ohi by them before Rev. Dr. Lawther.

In *Klaxon Co.* v. *Stentor Co.*, 313 U. S. 487, 496 (1941) reversing 115 F. (2d) 268 (C.C.A. 3rd, 1940), this Cour stated that in a diversity case, such as this, a federa court must follow the conflict of laws rules prevailing i the state in which it sits.

Thus, under the doctrine of *Erie R. Co.* v. *Tompkins supra,* the Court of Appeals was required, in any event to inquire into and apply as to this new issue, the conflic of laws rule prevailing in Pennsylvania. The question t be answered was this: In an equity action brought in Federal Court in Pennsylvania on the ground of diversit for specific performance of a contract made in Ohio, doe the law of Pennsylvania or the law of Ohio apply in th application of the equitable doctrine of "unclean hands" on the issue of whether petitioner had a right to seek the aid of equity in that Federal Court for specific per formance of that contract?

It is not necessary for us here to discuss the applicabl conflicts of law rule in that situation. We merely poin out that the Court of Appeals ignored the point and neve gave petitioner an opportunity to discuss it. We als point out that the conflict of laws problems inherent i the case were called to the attention of the trial cour in reference to issues and defenses which were actuall pleaded and raised in the trial court (40a, 47a; 120a-121a 533a).

Had the Court of Appeals made inquiry, it would hav found that Ohio, like Pennsylvania, has followed th

unclean hands rule, applicable here, as stated in *Pomeroy's Equity Jurisprudence, supra.* (See: *McClanahan* v. *McClanahan,* 79 Ohio App. 231, 235, 236 (1946); *Scottwood Realty Co.* v. *Bowman,* 21 Ohio App. 244, 249 (1926); *Halladay* v. *Faurot,* 8 Ohio Decisions Reprint 683 (1883).)

The decision of *McClanahan* v. *McClanahan, supra,* is peculiarly applicable here because it involves a closely analogous factual situation and states the applicable rule of unclean hands with fullness and clarity.

(5) The general equitable rule stated by *Pomeroy, supra,* has been followed in the federal courts. See for example *American Cooperative Serum Assn.* v. *Anchor Serum Co.,* 153 F. (2d) 907, 912 (C.C.A. 7th, 1946), where the Court stated:

> "'The rule that a complainant must come into equity with clean hands means that he must do equity as respects the defendant's rights in the particular matter of the suit. * * * If he is not guilty of inequitable conduct toward the defendant in that transaction, his hands are as clean as the court can require.'"

To the same effect see *National Labor Relations Board* v. *Fickett-Brown Mfg. Co., Inc.,* 140 F. (2d) 883, 884 (C.C.A. 5th, 1944).

Thus, the decision of the Third Circuit Court of Appeals is not only in conflict with the law of the appropriate state which, under decisions of this Court it was required to ascertain and apply, but is in conflict, also, with the same law as stated in decisions of other Circuit Courts of Appeals.

It should be added that the rule cited by the Court of Appeals (684) from Restatement, Contracts 1932 Ed. Sec-

tion 368 is not applicable herein in that enforcement of the parity agreement is not (in the wording of the rule) "in violation of the rights of a third person which are superior to those of the plaintiff. If the rights of the plaintiff and those of the third person are equal, the court may prorate performances". Whether that rule would have any application under the Rule of Decisions Act, in any event, does not appear.

The Court of Appeals completely misapprehended the facts and the applicable rule of law. This case illustrates the difficulties and gross injustice that can result when an appellate court, on its own, injects into a case an entirely new, unlitigated issue without the affected party having any opportunity of a hearing on the facts or law in respect thereof.

POINT II

The decision of the Third Circuit Court of Appeals that it could not and would not redetermine the credibility of the witnesses is in conflict with decisions of other Circuit Courts of Appeal on the same matter.

The Court of Appeals refused to redetermine the credibility of witnesses in this case on the erroneous assumption that the "trial judge has had the opportunity to observe the demeanor of the key witnesses upon the stand." Actually, as the record shows, the trial judge *did not* have the opportunity to observe the demeanor of the "key witnesses" upon the stand. The testimony of Rev. Dr. Lawther, the one master key witness in the case (as well as the testimony of petitioner's other corroborating witnesses who, too, were key witnesses of only slightly

less importance) *was taken on deposition.** Moreover, their veracity was not questioned by respondent.

Nevertheless, the Court of Appeals held that it, as "an appellate tribunal in a civil suit" and as a matter of "hornbook law" would not and could not redetermine the credibility of witnesses. It refused to reconsider the question of credibility, to reappraise the testimony or to review the case on the entire evidence. It accepted the trial judge's finding and judgment and held itself bound to do so without any exercise of its own judgment. Since the trial judge had hinged his finding of "no agreement" on the question of credibility of witnesses, the Court of Appeals, thus, effectively denied petitioner a review on appeal and made of his appeal a sterile procedure. In this respect its decision, clearly, is in conflict with the decisions of the other Circuit Courts of Appeal.

It is well settled that in the situation presented here, the appellate tribunal is in as good a position as the trial judge to evaluate such testimony and to draw inferences from it. The correct applicable rule is stated in *Stokes* v. *United States,* 144 F. (2d) 82, 85 (C.C.A. 2nd, 1944), where the Court of Appeals, in reversing a trial court's factual finding of negligence, stated:

> "The only eyewitness who testified before the trial judge concerning libellant's conduct was libellant himself. All the other evidence on that subject consisted of statements, by deposition or otherwise, of witnesses whom the trial judge neither saw nor heard. We are, therefore, in as good a

* Petitioner's entire case (other than his own testimony) consisted of the testimony, all taken on deposition, of seven corroborative witnesses and documentary proof (see Record Index, pp. iii, iv, vi-ix; 550a-613a). Another witness' testimony was excluded (erroneously) as "not proper rebuttal" (502a-504a).

> position as the trial judge to evaluate that testimony and to draw inferences from it. In such circumstances, it has frequently been held, we are not bound by his findings." (Cases cited.)

A District Court's finding on such evidence is subject to a full and free review on appeal unaffected by presumptions which ordinarily accompany such findings on controverted issues. (See *Carter Oil Co.* v. *McQuigg*, 112 F. (2d) 275, 279 (C.C.A. 7th, 1940) where, as here, a substantial part of the evidence consisted of oral testimony taken on deposition, the weight of which depended on the credibility of the witnesses giving it.)

The Court of Appeals had and should have assumed the burden of reappraising the question of credibility. See *Equitable Life Assur. Soc.* v. *Irelan*, 123 F. (2d) 462, 464 (C.C.A. 9th, 1941), where the Court stated:

> "Since all testimony bearing on the circumstances antecedent to and surrounding her death was by deposition, the finding of accidental death, while it is justly entitled to consideration, has not the weight we would otherwise be obliged to concede to it. *This court is in as good a position as the trial court was to appraise the evidence and we have the burden of doing that.* Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, was intended to accord with the decisions on the scope of the review in federal equity practice; and, as is well known, *in the federal courts where the testimony in equity* (cases cited) or admiralty (cases cited) *cases is by deposition the reviewing court gives slight weight to the findings.*" (Italics ours.)

See also *State Farm Mut. Automobile Ins. Co.* v. *Bonacci*, 111 F. (2d) 412, 415 (C.C.A. 8th, 1940) and *Luckenbach S.S. Co.* v. *United States*, 157 F. (2d) 250, 251 (C.C.A. 2d, 1946).

The provision in Rule 52(a) of the Federal Rules of Civil Procedure* that "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" does not justify a federal appellate court in accepting as not reviewable a trial judge's finding as to credibility of witnesses where the trial court had no opportunity to hear or observe the demeanor of any of the principal witnesses on one side of the case (other than the party) including the one most important and truly key witness in the case and other key witnesses.

Had the Court of Appeals properly construed the scope of appellate review in equity cases and had it not erroneously foreclosed itself from its power and duty to reappraise the deposition testimony of petitioner's witnesses, particularly Rev. Dr. Lawther, it might, and readily could, have found that this testimony represented the great weight of the credible evidence and that on the entire record the findings of the trial judge were clearly erroneous.

As it is, the Court of Appeals, by a destructive and futile judicial process, which represents a serious and substantial departure from recognized procedures in equity causes in federal courts, effectively closed its doors and the doors of equity to petitioner.

---

* Rule 52(a) of the Federal Rules of Civil Procedure, 28 U.S.C.A. following Section 723c "Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Request for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"

POINT III

The Circuit Court has not properly applied the rules as to the scope of appellate review in federal courts in equity cases and its decision in this respect is in conflict with the Federal Rules of Civil Procedure, applicable decisions of this Court and decisions of other Circuit Courts on the same matter.

The Court of Appeals, in deciding this case, has not properly interpreted or applied Rule 52(a) of the Rules of Civil Procedure within the rules laid down in *United States* v. *U. S. Gypsum Co., et al.*, 333 U. S. 364 (1948) or within the rules as correctly stated in other Circuit Courts of Appeal.

1. The Court of Appeals did not properly interpret or apply Rule 52(a) in holding that it could not redetermine the question of the credibility of witnesses where, as here, a substantial and vital part of such testimony was taken on deposition (see discussion and cases under Point II hereof).

2. The Court of Appeals has erroneously held that merely because a finding may be "amply supported by evidence adduced at the trial" such finding cannot be "clearly erroneous" within the meaning of said Rule 52(a) but is binding on the appellate court. This attitude on the part of the Third Circuit Court of Appeals is reflective of its holdings, in prior cases, that findings of a trial court are not clearly erroneous and may not be disturbed and that Court is without power to interfere with them upon appeal but is under the necessity of accepting them as conclusive, where such findings are supported by

"substantial" or "sufficient" or "ample" evidence. (See *Adam Hat Stores, Inc.* v. *Lefco,* 134 F. (2d) 101, 103 (C.C.A. 3rd, 1943); *Bethlehem Baking Company* v. *United States,* 129 F. (2d) 490, 491 (C.C.A. 3rd, 1942); *Plack* v. *Baumer,* 121 F. (2d) 676, 678 (C.C.A. 3rd, 1941).

That interpretation of Rule 52(a) is in conflict with the interpretation thereof by other Circuit Courts, which have held that the question is not whether there is any "substantial" evidence to support such findings but whether they are against the clear weight of evidence. See *State Farm Mut. Ins. Co.* v. *Bonacci,* 111 F. (2d) 412, 415 (C.C.A. 8th, 1940), where the Court in discussing Rule 52(a) states:

> "Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualification of the trial judge to pass on credibility.'"

To the same effect see *Fleming* v. *Palmer,* 123 F. (2d) 749, 751 (C.C.A. 1st, 1941) and cases there cited.

The rule followed in the Third Circuit has been justly criticized (see Review of Findings of Administrators, Judges and Juries: A Comparative Analysis, 58 Harv. L. Rev. 70, 88), where the author, after reviewing the subject, states:

> "Policy, authority and history all thus show the 'clearly erroneous' rule gives the reviewing court broader powers than the 'substantial evidence' formula.
>
> • • • • •

Moreover, the position of the Third Circuit on this subject is inconsisent with the recent decision in *United States* v. *U. S. Gypsum Co., et al., supra,* where this Court, in reversing findings of "no agreement" despite the opportunity of the trial court to appraise the credibility of the witnesses, stated:

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon the oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Here, it was the duty of the Court of Appeals to review the entire evidence and to decide therefrom, in the exercise of its own judgment, whether or not a mistake had been made. It had no right to accept blindly the judgment of this trial court. It had no right, sitting in equity, to close its conscience and its doors to the injured beneficiary seeking relief against the violating trustee, to ignore the trust principles and relationships involved and to bar him, especially on a new issue, from a full and free review and from equity.

This case, as it comes to this Court, involves no mere question of fact or of private interests. It involves a method of judicial process in the trial and appellate federal courts below which is destructive of equitable rights

and contrary to generally accepted equitable procedures. The case arises in a circuit where there are many litigants who are seeking equity and need a clarification of the principles and procedures applicable on trials and appeals. The issues raised here are of substantial importance in the administration of justice and equity in the federal courts.

CONCLUSION

The petition for the writ should be granted.

Respectfully submitted,

MARTIN A. SCHENCK,
KENNETH W. GREENAWALT,
Attorneys for Petitioner.

FILE COPY

Office - Supreme Court
FILED
OCT 5 194
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 305.

THOMAS W. SMITH, JR., Petitioner,

v.

JOHN T. McLANE, JOSEPH L. McLANE, NELL McLANE ARMSTRONG, CYNTHIA McLANE, LOUISA A. McLANE, MARY E. McLANE, individually; REED H. ALBIG and J. C. PETERSON, Trustees; PEOPLES CITY BANK OF McKEESPORT; and NATIONAL BANK OF McKEESPORT, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

WILLIAM H. ECKERT,
1025 Union Trust Building,
Pittsburgh 19, Pennsylvania,
Attorney for Respondents.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BLVD. OF ALLIES, PITTSBURGH 19, PA.

INDEX.

PAGE

Opinions Below 1

Statement of the Case 1

Summary of Argument 3

Argument 5

I.

Both Courts below Having Concurred in the Finding of Fact that there was No Agreement Made Such as is Sought to be Enforced, That Finding Should be Accepted by This Court 5

II.

Petitioner Has Changed His Theory on Appeal and His New Theory Should Therefore Not Be Entertained 26

III.

Consideration of "Clean Hands" Maxim not Necessary 34

IV.

Court of Appeals Correct Regarding "Clean Hands" Maxim 36

V.

Other Defenses 47

TABLE OF CASES.

PAGE

Agnew v. Southern Avenue Land Co., 204 Pa. 192, 53 A. 752 47
Allen v. Trust Company of Georgia, 326 U. S. 630 .. 5
American Ins. Co. v. Lucas, 38 F. Supp. 926, 129 F. 2d 143 ..... 37, 38, 39
Barton v. Benson, 126 Pa. 431, 17 A. 642 40
Beidler v. Davis, 72 Ohio App. 27, 50 N. E. 2d 613 47
Berner v. Diamond, 48 Ohio Law Abs. 505, 74 N. E. 2d 568 42-43
Bigley v. Risher, 63 Pa. 152 47
Browne v. Hoekstra, 279 Pa. 418, 123 A. 861 7
Canister Co. v. Wood & Selick, 73 F. 2d 312 47
Cashman v. Mason, 166 F. 2d 693 7
Cleo Syrup Corp. v. Coca-Cola Co., 139 F. 2d 416 .. 7
Cody v. Landis, 68 Ohio App. 225, 40 N. E. 2d 209 43
Collier v. Stanbrough, 6 How. 14 36
Comstock v. Group of Institutional Investors, 335 U. S. 211 5
Dayton-Goose Creek Railway v. U. S., 263 U. S. 456 29
Dent v. Ferguson, 132 U. S. 50 44
Equitable Life Assurance Society v. Irelan, 123 F. 2d 462 8
Estate of Elke Dayen, 97 Pa. Superior Ct. 250 40
Fountain v. Filson, 336 U. S. 681 37
Frank Adam Electric Co. v. Westinghouse E. & M. Co., 146 F. 2d 165 38
Friend v. Lamb, 152 Pa. 529, 25 A. 577 39
Girard Mammoth Coal Co. v. Raven Run Coal Co., 275 Pa. 439, 119 A. 495 39
Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U. S. 271 ..... 6, 9
Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co., 240 U. S. 251 35

PAGE

Helvering v. Gowran, 302 U. S. 238 36
Hennessy v. Woolworth, 128 U. S. 438 ..... 39, 47
Hershey v. Weiting, 50 Pa. 240 40
House v. Mayo, 324 U. S. 42 36
Howitt v. U. S., 328 U. S. 189 29
Hukill v. Yoder, 189 Pa. 233, 42 A. 122 40

Kentucky Vermillion M. & C. Co. v. Norwich U. F. Ins. Soc., 146 Fed. 695 29
Kihlken v. Kihlken, 59 Ohio St. 106, 51 N. E. 969 .. 42

LeTulle v. Scofield, 308 U. S. 415 36

McBrine Co. v. Silverman, 121 F. 2d 181 36
McNeely v. Bookmyer, 292 Pa. 12, 140 A. 542 47
Manhattan Medicine Co. v. Wood, 108 U. S. 218 44
Markovitz v. Markovitz, 336 Pa. 136, 8 A. 2d 42 47

New York Life Ins. Co. v. Calhoun, 114 F. 2d 526 .. 36

Park Lane Dresses v. Houghton & Dutton Co., 54 F. 2d 33 36
Precision Instrument Mfg. Co. v. Automotive M. Machinery Co., 324 U. S. 806 ..... 38, 44
Pride v. Andrew, 51 Ohio St. 405, 38 N. E. 84 42
Primeau v. Granfield, 193 Fed. 911 ..... 38, 39

Raiche v. Standard Oil Co., 137 F. 2d 446 29
Reynolds v. Boland, 202 Pa. 642, 52 A. 19 ..... 41, 45
Riley Investment Co. v. Commissioner, 311 U. S. 55 ..... 35, 36

Selz v. Unna, 6 Wall. 327 44
Slingluff v. Eckel, 24 Pa. 472 40
Smart v. Baroni, 360 Pa. 296, 61 A. 2d 860 40
Spokane I. Fair Ass'n. v. Fidelity & Deposit Co., 15 F. 2d 48 29
State Farm Mut. Automobile Ins. Co. v. Bonacci, 111 F. 2d 412 8

PAGE

Stevens v. Doylestown B. & L. Ass'n., 321 Pa. 173, 183 A. 922 47
Sunal v. Large, 332 U. S. 174 36

Tickel v. Shock, 80 Ohio App. 459, 72 N. E. 2d 154 47
Thomas v. Taylor, 224 U. S. 73 29

U. S. v. Atkinson, 297 U. S. 157 29
U. S. v. Carver, 260 U. S. 482 35
U. S. v. Ingalls, 114 F. 2d 839 7
U. S. v. Le Baron, 60 U. S. 73 29
U. S. v. Peterson, 34 F. 2d 245 29
U. S. v. U. S. Gypsum Co., 333 U. S. 364 8

Voss Bros. Mfg. Co. v. Voss, 157 F. 2d 263 7
Waltz v. Ellinghouse, 165 F. 2d 596 8
Watson v. Brewster, 1 Pa. 381 39

TEXT BOOKS.

Henry on Pennsylvania Trial Evidence (3 ed.), pp. 638-640 28
2 Pomeroy's Equity Jurisprudence, § 399 ..... 42, 44
2 Pomeroy's Equity Jurisprudence, § 401 ..... 44, 45
8 Standard Pennsylvania Practice, § 359 28

STATUTES.

Statute of Frauds, Pennsylvania Act of 1915, P. L. 543, § 4, as amended 1925, P. L. 310, § 2 (69 PS § 42) 47-48
Statute of Limitations, Pennsylvania Act of 1713, 1 Sm. L. 76 (12 PS § 31) 48
Rule 52(a) of the Federal Rules of Civil Procedure 6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 305.

THOMAS W. SMITH, JR., Petitioner,

v.

JOHN T. McLANE, JOSEPH L. McLANE, NELL McLANE ARMSTRONG, CYNTHIA McLANE, LOUISA A. McLANE, MARY E. McLANE, individually; REED H. ALBIG and J. C. PETERSON, Trustees; PEOPLES CITY BANK OF McKEESPORT; and NATIONAL BANK OF McKEESPORT, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

OPINIONS BELOW.

The original adjudication of the District Court is reported in 73 F. Supp. 849 and its opinion denying the petitioner's motion for a new trial is reported in 75 F. Supp. 219. The opinion of the Court of Appeals is reported in 174 F. 2d 819.

STATEMENT OF THE CASE.

Petitioner's statement of the case is misleading, particularly in that petitioner persists in referring to himself as a "wronged beneficiary" and to the respondent John T. McLane as a "violating trustee", when as a matter of fact no trust relationship existed between those parties on June 24, 1937, if ever, and no breach of trust was ever committed by John T. McLane. June 24, 1937,

is the date when the petitioner alleges there was made the oral agreement of which he seeks specific enforcement and by which he is attempting to get half of The Sun Rubber Company stock purchased by his uncle since that date at the price which his uncle paid for it (R. 106). John T. McLane ceased to be a trustee on December 29, 1932, more than four years before the alleged making of the agreement in dispute (Exhibit G, R. 430, 619). The first and only "pledging" of the stock was by the so-called "Trust Agreement" of July 9, 1935, and at that time John T. McLane was the outright owner of all of the stock in question and had the right therefore to pledge it (R. 59-62, 476, 619). The trust of which an accounting was asked and granted and which was commonly referred to at the trial as "the trust" was that created by the so-called "Trust Agreement" of July 9, 1935 (R. 59-62, 133), and the alleged breaches thereof were all after June 24, 1937, by the trustees (of whom John T. McLane was never one) of that trust (R. 42-43, 68-69, 637). The attack upon this trust went to the question whether the bank beneficiaries under the "Trust Agreement" of July 9, 1935, should not already have been paid in full, in which event petitioner would be presently entitled to receive the 327 shares allotted to him by the so-called "Distribution Agreement" of June 24, 1937 (Exhibit 6, R. 147, 558). The petitioner's present attempt to influence the decision of the question whether John T. McLane agreed with him on June 24, 1937, that each would offer to sell the other half of all Sun Rubber stock thereafter acquired by him at cost, by the administration of the trust under the "Trust Agreement" of July 9, 1935, by Joseph L. McLane, Josie E. McLane, Reed H. Albig or J. C. Peterson is without justification in fact and wholly contrary to petitioner's position at the trial (R. 132, 516). There was no contention in the Trial Court that any "trust principles" applied to the

determination of the question of fact whether petitioner and John T. McLane had made the oral agreement of which specific performance is sought. That alleged oral contract was independent of and aside from any trust and related only to stock which petitioner or John T. McLane might thereafter acquire with his own funds from third parties and with respect to which stock John T. McLane owed no fiduciary obligation whatever to the petitioner. This will be amplified in subdivision II.*

Other errors in petitioner's statement of the case will be corrected in the course of our argument. The material facts are stated in the opinion of the Court of Appeals (R. 681-683, 174 F. 2d at 820-821) and hereafter in this brief. To avoid lengthening this brief we do not repeat them here.

SUMMARY OF ARGUMENT.

I. Both Courts below having concurred in the finding of fact that there was no agreement made such as is sought to be specifically enforced, that finding should be accepted by this Court. There is no "very obvious and exceptional showing of error" in that concurrent finding of fact, especially when due regard is given to the opportunity of the Trial Court to judge of the credibility of the witnesses. Ten witnesses testified in person in the Trial Court, and among them were the petitioner and John T. McLane, who were the principal witnesses and both of whom testified at length.

II. Petitioner's present attempt to have the question of fact whether petitioner and John T. McLane orally agreed on June 24, 1937, that each would offer to the other at cost half of any Sun stock thereafter ac-

---

* Post, pp. 26-33.

quired by him decided on "trust principles", constitutes a change of position by petitioner since the case left the District Court and is therefore barred by the recognized principle that an appellate court will not reverse a trial court on a theory or questions which were not presented to the trial court.

III. Consideration of the "clean hands" maxim is not necessary to the disposition of this case, because the finding of fact by both Courts below that no such oral agreement was made as is sought to be specifically enforced is alone decisive.

IV. If the "clean hands" maxim is to be considered, the Court of Appeals did not err with respect to it. Under Pennsylvania law the "clean hands" maxim applies regardless whether the plaintiff's inequitable conduct injured the defendant or a third person. Such is also the law in Ohio and in the Federal Courts.

V. The alleged oral contract is not proved with sufficient definiteness in all material terms to be specifically enforced. The Statute of Frauds relating to sales of personalty, the Statute of Limitations and the doctrine of laches are additional reasons why the judgments below are right.

VI. There is no question of public importance or general interest involved in this case. Only the private rights of the parties to a family quarrel are at stake. Certiorari should therefore be denied.

ARGUMENT.

I.

Both Courts below Having Concurred in the Finding of Fact that there was No Agreement Made Such as is Sought to be Enforced, That Finding Should be Accepted by This Court.

The phase of this case involved on appeal turns upon a question of fact, which is, did petitioner and John T. McLane orally agree on June 24, 1937, that each would offer to the other one-half of all stock in The Sun Rubber Company which he thereafter acquired at its cost to him? Both the District Court and the Court of Appeals concurred in deciding that question of fact in the negative, i.e., that *no such agreement was made* (R. 634, 645, 682-683, 73 F. Supp. 849, 75 F. Supp. 219, at 220, 174 F. 2d 819, at 821). Both the Trial Court and a unanimous Court of Appeals having concurred in finding as a fact that there was no such agreement as is now sought to be specifically enforced, that should end the part of this case that was appealed because this Court has repeatedly held that concurrent findings of the two lower Courts will be accepted as conclusive by this Court, at least unless a very obvious and exceptional showing of error is made. Thus in *Allen v. Trust Company of Georgia,* 326 U. S. 630, this Court in affirming a decision that two gifts had not been made in contemplation of death and that therefore no estate tax was due on them, said by Mr. Justice Douglas (p. 636):

> "Those findings, being concurrent findings of the two lower courts, will be accepted here without reexamination of the evidence."

In *Comstock v. Group of Institutional Investors,* 335 U. S. 211, this Court in affirming said through Mr. Justice Jackson (p. 214):

"A seasoned and wise rule of this Court makes concurrent findings of two courts below final here in the absence of very exceptional showing of error."

In the even more recent case of *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, this Court, in accepting the findings of fact concurred in by the two lower courts and after quoting part of Rule 52(a) of the Federal Rules of Civil Procedure, said by Mr. Justice Jackson (p. 275):

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings. These are manifestly supported by substantial evidence * * *. A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Many other decisions of this Court to the same effect as these three are cited in the opinions of this Court immediately following the three above quotations.

The portion of Rule 52(a) quoted in this Court's opinion in *Graver Tank & Mfg. Co. v. Linde Air Products Co., supra,* and which is applicable to the case at bar, is as follows:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The Court of Appeals complied with that Rule. The Court of Appeals expressly decided that the District Judge's refusal to find that petitioner and John T. McLane had orally agreed that each would offer to the other

at cost half of any Sun stock thereafter purchased by him, was not "clearly erroneous"-and specifically outlined considerable of the established facts and evidence which led it to that conclusion (R. 683, 174 F. 2d at 821). It is admitted that no one was present when such an agreement as is sought to be specifically enforced is alleged to have been made other than petitioner and John T. McLane (R. 107, 136), and consequently the only direct evidence whether such an agreement was made comes from those two men. Petitioner and John T. McLane were therefore correctly described by the Court of Appeals as the "key" witnesses. The Trial Judge saw both of them upon the witness stand, as well as eight other witnesses, and therefore was in the best position to judge their credibility. The Trial Judge expressly based his finding that there was no such agreement as is in dispute upon "the credibility of the witnesses" (R. 645, 75 F. Supp. at 220). This is therefore a proper case for the application of the mandate contained in Rule 52(a) that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses" and the Court of Appeals properly complied with that mandate.

In determining whether a finding of fact of a trial court is "clearly erroneous", all evidence and inferences therefrom favorable to the appellee are accepted as true: *U. S. v. Ingalls,* 114 F. 2d 839, 840 (C. A., D. C.); *Cleo Syrup Corp. v. Coca-Cola Co.,* 139 F. 2d 416, 418 (C.C.A. 8), cert. den. 321 U. S. 781; *Voss Bros. Mfg. Co. v. Voss,* 157 F. 2d 263, 266 (C.C.A. 8); *Cashman v. Mason,* 166 F. 2d 693, 696 (C.C.A. 8); *Browne v. Hoekstra,* 279 Pa. 418, 421, 423, 123 A. 861, 862. The necessary corollary is that all conflicting testimony and all inferences unfavorable to the appellee must be rejected.

No different rule with regard to appellate review of questions of fact is established by any case cited in peti-

tioner's brief, nor does any of those cases convict the learned Court of Appeals of error in the case at bar. In *U. S. v. U. S. Gypsum Co.,* 333 U. S. 364, the District Court had dismissed the Government's complaint at the close of the Government's evidence, but this Court was of the opinion that the documentary evidence and admitted facts were sufficient to constitute a violation of the Sherman Anti-Trust Act. *Equitable Life Assurance Society v. Irelan,* 123 F. 2d 462, as the quotation from it in petitioner's brief (p. 26) shows, is confined to a case in which *all* the testimony is presented by depositions. That is not the situation in the case at bar, for here the only two persons who were present when the agreement, the existence of which is in dispute, is alleged to have been made and who were therefore the principal witnesses, both testified personally at length in the Trial Court, and eight other witnesses also personally took the witness stand there. The quotation in petitioner's brief (p. 29) from *State Farm Mut. Automobile Ins. Co. v. Bonacci,* 111 F. 2d 412, 415 (C.C.A. 8), was not the Court's own language, but a quotation from Simkins Federal Practice, p. 488, and contrasted with that is the more recent decision of the Court of Appeals for the same Circuit in *Waltz v. Ellinghouse,* 165 F. 2d 596, where in affirming a nonjury case that Court said that in the absence of an error of law (p. 597) "The findings are not erroneous unless they are without an adequate evidentiary basis". In the case at bar there was adequate evidentiary basis for the Trial Court's finding of fact in question, as is shown in the opinion of the Court of Appeals (R. 683, 174 F. 2d at 821). Without mentioning the other cases cited in points II and III of petitioner's brief specifically, we respectfully submit that they are all distinguishable from the case at bar and that none of them requires the granting of a writ of certiorari in this case.

That the Court of Appeals did "review the entire evidence", as petitioner argues in his brief (p. 30) was its duty, is shown by its reference to the petitioner's evidence as well as that of respondent (R. 682, 174 F. 2d at 821).

The crucial finding of fact that no oral agreement was made on June 24, 1937, between petitioner and John T. McLane that each would offer to the other half of any Sun stock or interest in such stock which he thereafter acquired at the price which it had cost him, which finding was concurred in by both Courts below, is not very obviously in error and has not been shown to be so by any exceptional showing, to use the words of this Court in its latest pronouncement on the conclusiveness of findings of fact concurred in by both lower courts (*Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U. S. 271, 275, *supra*). To demonstrate this, we respectfully trust that the Court will indulge us in a review of the evidence, though we deeply regret that such review will extend this brief far beyond ordinary length.

John T. McLane denied unequivocally that he had entered into any agreement with petitioner that each would offer to the other at cost half of any Sun stock thereafter acquired by him (R. 415-416). Mr. McLane's denial of any agreement such as is now sought to be enforced is corroborated by many cogent facts, one of which is the unexplained anomaly that the other two parts of the alleged oral agreement were reduced to writing and signed on the same day the alleged oral agreement was made. The part of the alleged oral agreement relating to distribution of the 1250 shares in the trust was covered by the distribution agreement, Exhibit 6 (R. 147, 558). The part relating to petitioner becoming general manager and eventually president of The Sun Rubber Company was reduced to writing in Exhibit A (R. 171, 614). If there had been a third part to the oral agreement, as is now alleged, providing

for division of future stock acquisitions, it would also, according to all logic, reason and experience, have been reduced to writing at the same time. This natural presumption is fortified by petitioner's testimony that the purpose in going to Mr. Farrell's office where the distribution agreement and the employment letter were written and signed, was to put in writing the portion of the agreement relating to "parity" (R. 174). If there had been any oral agreement for future parity it naturally also would have been reduced to writing. Admittedly, however, there is absolutely nothing in writing evidencing any agreement for future parity or, more specifically, that if either the petitioner or John T. McLane should thereafter acquire any stock in The Sun Rubber Company he would offer to sell half of it to the other at the price which he had paid for it (R. 170). Not only is there no written instrument signed by either of the McLanes evidencing any such agreement for future parity, but it is further admitted that there is not even anything written by the petitioner prior to the date he swore to the original Complaint on February 25, 1946, asserting that there was any such agreement (R. 170). It was even admitted that no oral demand for any part of the stock purchased by John T. McLane subsequent to June 24, 1937, was made until February 25, 1946, when the petitioner swore to the original Complaint and two days before this suit was instituted (R. 170).

The Trial Court and the Court of Appeals are not to be criticized for not believing that if the alleged oral agreement had included the third point which petitioner now contends it did, there would not have been something in writing evidencing or asserting such an agreement either by petitioner or the respondents before well over eight years had elapsed, i.e., from 1937 until 1946. This is all the more true because the petitioner admitted that he learned of the purchase by John T. McLane of the Carr stock at the time when those shares were trans-

ferred on the Company's books from Carr to John T. McLane on May 18, 1939 (R. 180). Petitioner also admitted that he learned of the subsequent transfers to John T. McLane or members of his family within three weeks at the most after each transfer was made (R. 181-182) and that he learned in 1942 or 1943 of the purchase by John T. McLane of the beneficial interest of two of the other distributees named in the distribution agreement (R. 162). As secretary of The Sun Rubber Company since 1928 petitioner admittedly has had custody of and access to the stock certificate books of the Company at all times, and therefore was in a position to learn of all stock transfers promptly (R. 180). Knowing of those transfers soon after they were made and admittedly not having made any demand for any part of the shares involved until February 25, 1946,— almost seven years after the Carr sale—is wholly incompatible with the existence of any such agreement as petitioner now says there was.

The natural conclusion that the oral agreement did not include anything that was not reduced to writing is strengthened by the clear testimony of J. Paul Farrell, Esquire, a member of the bar, who was admitted by petitioner's counsel to be "a reputable witness" (R. 528). Mr. Farrell testified that while the distribution agreement (Exhibit 6) was being typed he asked if that was all and the petitioner said "No. There is one other thing" and that was to put in writing the agreement concerning his becoming general manager of The Sun Rubber Company because "he wanted everything that had been agreed to that day put down in writing so there would be no misunderstanding or argument in the future" (R. 483); that accordingly the employment letter (Exhibit A) was written; and that after Exhibits 6 and A had been written, read and signed (R. 484):

"* * * I asked them then* if that was everything they agreed to that day and they said it was.

Q. When you said, 'they said it was', whom do you mean?

A. I mean John McLane and Joseph McLane and Thomas W. Smith, Jr."

John T. McLane and Joseph L. McLane testified to the same effect (R. 414, 474).

There is no contention that petitioner at the meeting in Mr. Farrell's office requested that anything be put in writing regarding division of future acquisitions of Sun stock. Petitioner stated that he had testified to everything that had been said at Mr. Farrell's office on June 24, 1937 (R. 191). Nowhere in his testimony is there anything to the effect that he asked that any agreement relating to division of future acquisitions of Sun stock be reduced to writing.

Also supporting the finding that there was no oral agreement to divide future acquisitions of stock between petitioner and John T. McLane is the 20th admission in the Stipulation of Facts, which is as follows (R. 57):

> "On April 9, 1943, the plaintiff, Thomas W. Smith, Jr., purchased 50 shares of common stock of The Sun Rubber Company from Mrs. Effie Clark Mackey, but made no offer to divide said shares with the defendant John T. McLane or offer to permit said John T. McLane to acquire any of said shares until February 25, 1946."

There is no evidence anywhere in the record explaining the approximately three years' delay of the petitioner in offering John T. McLane any part of the 50 shares which the petitioner purchased from Mrs. Mackey

---

* The word "then" is omitted in appellant's Appendix but will be found in the original transcript at p. 558.

on April 9, 1943. The petitioner studiously avoided any reference in his testimony to that purchase by him. If there had been such an agreement as the petitioner now seeks to enforce he would in good faith have been required to offer half of those shares to John T. McLane promptly after acquiring them on April 9, 1943. Instead, however, he silently retained them for nearly three years until the eve of suit, when his counsel doubtless told him he must make such an offer in order to be consistent with the legal position he was about to assert. Petitioner's conduct, therefore, belies the existence of such an oral agreement as he now asks the Court to enforce.

Petitioner has sworn to discrepant versions of the alleged oral agreement. Petitioner personally signed and swore to the original Complaint and to the "Amended Complaint" (R. 666-668). According to paragraph 8 of the original Complaint and paragraph 9 of the Amended Complaint (R. 11, 655), the alleged oral agreement was (1) a tri-partite agreement among Smith, John T. McLane and Joseph L. McLane; (2) the agreement necessarily must have been made in McKeesport, Pennsylvania, because the petitioner admitted (R. 195) that that was the only place he saw Joseph L. McLane on June 24, 1937; (3) the equalization was to be only between the petitioner and John T. McLane personally, without including members of their families or any others; and (4) the equalization was to continue "at all times." At the trial on February 17, 1947, the petitioner materially changed the alleged oral agreement by testifying (1) that it was only a bi-party agreement between him and John T. McLane; (2) that the agreement was made in Akron, Ohio; and (3) that the equalization was to last only as long as the 1935 trust continued (R. 107-109). Leave was thereupon asked to amend the Amended Complaint and the trial was continued (R. 115-118). Thereafter the "Second Amended Complaint"

was filed, in paragraph 7 of which (R. 39) a fourth material change was made in the alleged oral agreement. This change was that the equalization was not to be confined to the petitioner and John T. McLane alone, but was expanded to include their immediate families as well. This last change was manifestly made to fit the alleged oral agreement into the immutable distribution agreement (Exhibit 6). According to the distribution agreement nothing approaching equalization between the petitioner and John T. McLane was attained, because under that written agreement petitioner was to get only 327 shares whereas John T. McLane was to get back the 384 shares which had belonged to him at the outset plus 219 other shares, which added to 6 shares he held outside any trust, gave him a total of 609 shares (R. 147, 558).

The petitioner manifestly is himself uncertain as to the terms of the alleged oral agreement which he now seeks to have specifically enforced and is willing to swear to whatever seems expedient and to fit the alleged oral agreement into facts which are immutable because they are in writing. Are the learned Trial Court, who saw the petitioner at length on the stand, and the unanimous Court of Appeals to be reversed because they refused to accept the petitioner's latest version of the alleged oral agreement when the petitioner has so often and so materially himself varied the terms of the alleged oral agreement, the parties to it and the place where it was made?

The petitioner's discordant statements of the alleged oral agreement are rendered even more incredible by the petitioner's asseveration that though he was relying solely upon his memory, he remembered that two hour conversation of more than ten years before, *verbatim* (R. 171). If the petitioner remembers the conversation *verbatim,* why did he not state the alleged oral agreement at first as he has finally?

That the Court cannot rely upon the petitioner's credence is also proved by the petitioner's testimony that from Akron, Ohio, he and John T. McLane on June 24, 1937, first went to Lakewood, Ohio (which according to the road map, Exhibit M (R. 486), is 8 miles west of Cleveland on Lake Erie), and had more than an hour conference there with Dr. Lawther before going to McKeesport, Pennsylvania. By what appears to be the shortest route it is 41.2 miles from the Akron City Club to the Lakewood Presbyterian Church and 155½ miles from the Lakewood Presbyterian Church to the McLane Company office on Sixth Avenue in McKeesport (R. 420-422, 476-477, 485-487, 492 and see the road map, Exhibit M, R. 486). In 1937 Akron and the Cleveland district used Eastern Standard Time, but McKeesport used Eastern Daylight Saving Time (R. 177, 384, 397, 467). For convenience we shall translate all times hereinafter mentioned into Eastern Daylight Saving Time. According to the petitioner, he and John T. McLane left Akron about noon; drove to Lakewood, arriving there about 1:00 P. M.; left Lakewood between 3:00 and 3:30 P. M.; drove back to Akron and stopped there about one-half hour; then drove to the McLane Company office in McKeesport, arriving there between 7:00 and 8:00 P. M.; left the McLane Company office between 8:30 and 9:00 P. M.; then ate dinner at the G. C. Murphy Company cafeteria in McKeesport; then went to Mr. Farrell's office in McKeesport, arriving there between 10:00 and 11:00 P. M.; and left Mr. Farrell's office about an hour later, which would be between 11:00 P. M. and midnight (R. 137, 177-178, 191, 202). Not only is this contradicted by John T. McLane, who testified that they drove directly from Akron to McKeesport (R. 385), but also by three disinterested witnesses and the probabilities according to common experience.

Mrs. Madden, now a housewife but in June, 1937, the stenographer in the McLane Company office, testified definitely that she never worked beyond her quitting time at 5 o'clock; that Messrs. Smith and John T. McLane arrived at the McLane Company office about half an hour before her quitting time; and that she typed the list of McLane Company stockholders after Smith and John T. McLane had arrived at the McLane Company office (R. 446-448). In other words, according to the clear testimony of this witness, the petitioner and John T. McLane arrived at the office of McLane Co., Inc., in McKeesport about 4:30 P.M. They could not possibly have done that if they left Akron about noon, had gone to Lakewood, Ohio, had a conference for an hour or more there and then returned to Akron for half an hour, as the petitioner testified. No matter how fast the petitioner drives his automobile, is it believable that petitioner could leave Lakewood, Ohio, at 3:00 or 3:30 P.M. and arrive in McKeesport, a distance of over 150 miles, at 4:30 P. M.? Going back to Akron and stopping there for half an hour or so, as the petitioner testified they did (R. 141, 202), would have left not more than an hour to have driven from Lakewood, 8 miles west of Cleveland, Ohio, to McKeesport, 12 miles beyond Pittsburgh, Pennsylvania, a distance of over 150 miles (R. 487, 492). The petitioner admitted that there was a woman clerk in the McLane Company office when he and John T. McLane arrived there on June 24, 1937 (R. 195). That woman must have been Mrs. Madden, who never worked after 5 o'clock. If petitioner and John T. McLane had not arrived at the McLane Company office until 7 or 8 o'clock, as petitioner testified (R. 177), petitioner would not have seen Mrs. Madden.

Can this Court believe that petitioner and the two McLanes ate their dinner at the G. C. Murphy Company cafeteria between 8:30 and 10:30 P. M., which would be

the earliest time possible according to the petitioner's testimony (R. 177-178)? That the restaurant in such a store should be open so late at night is contrary to common experience, at least in the Pittsburgh district. The hostess at the G. C. Murphy Company restaurant, Mrs. Gerzenyi, forced in by subpoena, testified that as long as she has been there, which is since 1935, the G. C. Murphy Company cafeteria has closed at 2:00 P. M. and the dining room at 7:30 P. M. (R. 404-405). If Messrs. Smith and John T. McLane had gone to Lakewood first, after leaving Akron at noon, and had had a conference for an hour or more there, leaving Lakewood at 3:00 or 3:30 P. M., as the petitioner testified, they would never have eaten their dinner at the G. C. Murphy Company restaurant in McKeesport, Pennsylvania, the same day.

Instead of the meeting in Mr. Farrell's office having been between 10:00 P. M. and midnight, as the petitioner testified (R. 178, 191), it was between 7:30 and 9:30 P. M. according not only to the two McLanes and Mr. Farrell but also according to Miss Brieck, a disinterested witness (R. 397-398, 410, 414, 471, 474, 482, 484). Miss Brieck was only 17 at that time and testified that she never worked beyond 9:30 at night (R. 398-399). Her testimony was particularly impressive because, as the Trial Judge could see, she was a pretty little girl who might well have been in danger if she was out near midnight, as she would have been under the petitioner's testimony. Furthermore, it is contrary to ordinary experience to have a meeting in a lawyer's office between 10 o'clock and midnight for the purpose of having an agreement reduced to writing. If the meeting in Mr. Farrell's office was between 7:30 and 9:30 P. M., it would have been impossible for the petitioner and John T. McLane to have left Akron at noon, have gone to Lakewood, Ohio, had an hour or two conference there, and have had a conference in the McLane Company office

for an hour or more, all on the same day, as the petitioner testified.

From the admitted fact that the petitioner and John T. McLane did not leave Akron until noon, and the established facts that they arrived at the McLane Company office in McKeesport, Pennsylvania, about 4:30 P. M., ate at the G. C. Murphy Company's restaurant which closed at 7:30 P. M., and that the conference in Mr. Farrell's office ended about 9:30 P. M., all on June 24, 1937, the irresistible conclusion is that the petitioner and John T. McLane did not go to Lakewood, Ohio, on that day. There is no contention that the petitioner and John T. McLane went to see Dr. Lawther on any other day regarding the alleged oral agreement which is now sought to be specifically enforced and there is no reason why they should have done so, because harmony was admittedly restored that day, viz., June 24, 1937. It therefore follows that Dr. Lawther must have been thinking about some prior conversation with these two men. Dr. Lawther admitted that he had had many conferences with the petitioner and John T. McLane, both together and separately, at which there were long discussions of affairs relating to The Sun Rubber Company, including the personal problems of the petitioner and John T. McLane growing out of Sun business (R. 284-285, 290). Dr. Lawther admitted also that he was a very busy man; that he had had many conferences with people regarding their troubles; that he was depending solely upon his memory; and that he did not profess to be able to remember what had been said in his many conversations with the petitioner and John T. McLane (R. 283-284). Admittedly, there was a conference among Dr. Lawther, the petitioner and John T. McLane regarding the petitioner's position at The Sun Rubber Company, but that was in 1935 (R. 432). Admittedly also, there have been discussions with Dr. Lawther regarding distribution of the beneficial interests in the 1935 trust (R. 386). That

Dr. Lawther is mistaken is also indicated by the fact that according to him it was agreed at the conference which he had in mind that the 1250 shares were to be divided among the stockholders of McLane Co., Inc., "On the basis of the holdings which each one individually had in the McLane Company." (R. 288-289). A comparison of the distribution agreement (Exhibit 6, R. 147, 558) with the list of stockholders in McLane Co., Inc., on June 24, 1937 (Exhibit K, R. 470, 621), discloses that the 1250 shares were not distributed in any proportion to the stockholdings in McLane Co., Inc., on the same date. The petitioner was alloted 327 shares in the distribution agreement, whereas he had only 118 shares in McLane Co., Inc., on June 24, 1937, and all of the shareholders other than the petitioner, Lawther and the McLanes were allotted the same number of shares under the distribution agreement as they owned in McLane Co., Inc., without any participation whatever in the excess of 1250 shares of Sun stock over the 1057 shares of McLane Co., Inc., stock then outstanding. We do not contend that Dr. Lawther deliberately lied, which is the most that we conceded at the trial as to any of petitioner's witnesses (R. 538), but we submit that his recollection of what was said a decade or more ago is not accurate and that he is extending other discussions of parity beyond the proper application of that word to this case, all of which is only human in view of the length of time which has elapsed. Dr. Lawther's testimony on the subject of parity is very general. Nowhere does Dr. Lawther say that it was agreed that if either the petitioner or John T. McLane thereafter acquired any Sun stock he would offer half of it to the other at the price which he had paid for it. Undeniable facts establish that the petitioner and John T. McLane did not confer with Dr. Lawther on June 24, 1937; they could not have told him of any parity agreement regarding future stock acquisitions prior to that date because the

agreement is not alleged to have been made until that date, and there is no contention that the petitioner and John T. McLane conferred with Dr. Lawther after June 24, 1937.

If Dr. Lawther knew that there was an agreement between the petitioner and John T. McLane to maintain parity after June 24, 1937, Dr. Lawther helped to break that agreement because he admittedly sold 85 shares of Sun stock to John T. McLane on December 17, 1943 (R. 347, 588). What has just been said applies also to petitioner's witness Mrs. Mackey, because on April 9, 1943, she sold 50 shares to the petitioner, no part of which was offered to John T. McLane until the eve of suit (R. 57).

Petitioner relies upon various vague statements regarding parity which John T. McLane is alleged to have made. None of these alleged admissions was a full statement of all the material terms of a complete contract. None of the petitioner's witnesses had any written memorandum of any alleged admission (R. 234, 251, 283, 302). Mr. McLane denied having made any such admissions (R. 385, 419, 426, 427). Human memory of what was said years before is too unreliable, we respectfully submit, to reverse the finding of fact of a trial court and Court of Appeals, particularly when their finding is supported by cogent evidence such as has been pointed out above in this brief. Aside from the general inability of the human mind to remember accurately what was spoken orally years before, there are specific reasons for discounting the testimony of the petitioner's witnesses. Space does not permit reference to all such reasons. Some of them relating to Dr. Lawther have already been mentioned. Petitioner's witness Etling denied categorically that he had ever given any written statement to the petitioner's lawyers (R. 254). In fact, he had and had signed it (R. 254-255). Mr. Marion admitted that the petitioner is his "boss", that the peti-

tioner has authority to discharge him, that he takes his orders from petitioner, and that he is dependent upon his employment at Sun for his livelihood (R. 233). Mr. Burke reluctantly admitted that he is a personal friend of the petitioner and that most of the conversations between them regarding petitioner's going to work for The General Tire & Rubber Company took place in the petitioner's home (R. 308-309). That Mrs. Mackey is a very close personal friend of the petitioner is admitted (R. 78, 639). The testimony of these witnesses must be weighed with their bias.

The testimony of Mrs. Mackey is inherently improbable. She says that she spoke to Mr. McLane only once, and that was "a few weeks before the 1938 stockholders' board meeting, or maybe a few days" (R. 267). It should be remembered that harmony existed between the petitioner and John T. McLane during 1938. Mrs. Mackey continuing, says that she was concerned on account of her investment in Sun stock and said to Mr. McLane "I understood they were having a new man to put up for a director who was not qualified and who was more or less lined up with him, being a relative, and I wasn't very happy about the situation, and we talked at length about it and Mr. McLane assured me he was going to keep his agreement with Mr. Smith" (R. 268). Why Mr. McLane would, when asked about a proposed new director, refer to his alleged agreement with Mr. Smith, is incomprehensible. The question raised by Mrs. Mackey was the fitness of the proposed new director. There was at that time no question regarding petitioner's remaining with The Sun Rubber Company or any question whether John T. McLane was going to keep his alleged agreement with the petitioner. The first stock purchase by John T. McLane about which any question is raised was the Carr stock and that was not purchased by him until May 18, 1939—more than a year after Mrs. Mackey's alleged conversation with Mr. McLane. There was therefore ab-

solutely nothing to call forth any statement by Mr. McLane to Mrs. Mackey, admittedly a total stranger, that he had any agreement to divide future acqusitions of stock with the petitioner at the time when that statement is said by Mrs. Mackey to have been made, viz., "a few weeks * * * or maybe a few days" before the 1938 stockholders' meeting, which was on April 25, 1938.

The tricks that memory can play are illustrated by petitioner's repeated testimony that the office of McLane Co., Inc., to which he and John T. McLane went on June 24, 1937, was on Ringgold Street (R. 110, 142). It was proved, however, by the written lease (Exhibit B) and finally stipulated (R. 407-408, 467-468) that the office of McLane Co., Inc., has been at 431 Sixth Avenue since at least February 1, 1936.

Neither John T. McLane nor Joseph L. McLane knew on June 24, 1937, how many shares of Sun stock were owned by petitioner or his wife (R. 431, 470). Neither of the McLanes, therefore, could have known that the 327 shares which petitioner would eventually get under the distribution agreement would result in petitioner and his wife having 6 less shares than John T. McLane then had and would get under the distribution agreement. Neither of the McLanes saw petitioner's computations (R. 471, 477-478). The McLanes denied that anything was said at the McLane Company office on June 24, 1937, to the effect that parity or equalization of stock ownership between petitioner and John T. McLane was to be accomplished (R. 409-410, 469-470).

Petitioner's theory at the trial was that his leaving The Sun Rubber Company placed it in such a dilemma that John T. McLane was willing to agree to anything to get him back. The record, however, supports a different conclusion. Admittedly, The Sun Rubber Company's plant operated throughout the month of June, 1937 (R. 184). It is admitted also that M. S. Lower was then the Vice President and General Manager of the

Company and had been since 1924; that he was an experienced rubber production man and attended to all buying, manufacturing and hiring of factory personnel, and that he had at least one good customer (R. 57, 185). The financial statements of the Company in evidence show that it was in a healthy condition in 1937 (R. 443, Exhibits H, I and J). The Company paid dividends in March and December, 1937, aggregating $7.50 (R. 56). The Company previously had operated satisfactorily when the petitioner had been away for as long as a month (R. 418). The unsubstantial nature of the petitioner's severance of relations with Sun and going to work for General was admitted (R. 56-57). The only way in which petitioner's nominal quitting is alleged to have prejudiced Sun was by suspension of a line of credit which it had arranged less than two weeks before at a new banking connection (R. 197-200). The necessity of borrowing to carry on the Company's operations was nothing new (R. 58). The Company's business was admittedly of a seasonal nature, building up inventory in the spring and summer, which would move out quickly in the fall (R. 185-186, 245). The Company engaged in a building program about every other year which, together with the seasonal nature of its business, required frequent loans (R. 245-246). John T. McLane testified that he could himself have loaned the Company the money to meet its next payroll, as he had done before (R. 416-417). Petitioner's evidence discloses that $75,000 could have been borrowed from a Columbus insurance company in June, 1937 (R. 218). That amount plus the $30,000 which had been borrowed from the First-Central Trust Company on June 9, 1937 (R. 216), exceeded the total of $90,000 which it was admitted by stipulation was the maximum amount borrowed by the Company during 1937 (R. 58). Finally, the uncontradicted evidence is that the Peoples City Bank of McKees-

port was willing to loan The Sun Rubber Company as much as $100,000 in June, 1937, — and that regardless whether the petitioner remained with the Company or not (R. 444-445). There was, therefore, no such financial crisis as would force John T. McLane to surrender to any demand petitioner might exact.

The truth, we respectfully submit, and the version of the evidence which should be accepted under the authorities hereinbefore* cited, is that petitioner was not happy at The General Tire & Rubber Company, particularly because he was not to receive as large a cash salary there, because he was compelled to take orders there from others, which he did not like, and because any injury he did to The Sun Rubber Company would reduce the value of the stock in that Company which he and his wife owned; and that, therefore, after spending June 23, 1937, at the office of General he came to see his uncle at the latter's room in the Akron City Club and asked to be taken back into the Sun organization; that he was not in the position of exacting tribute for his return, but on the contrary was asking for the forgiveness of his uncle; that his uncle forgave him; and that the only things agreed to be given to the petitioner were the number of shares allocated to him in the distribution agreement (Exhibit 6, R. 147, 558) and the general managership and ultimately presidency of Sun, as provided in Exhibit A (R. 171, 614). This is in accordance with what John T. McLane testified the petitioner told him on the evening of June 23, 1937 (R. 380-381), which testimony it is significant was not contradicted in rebuttal. That the petitioner was to receive a smaller cash salary at General than he had been receiving at Sun appears, contrary to the petitioner's own testimony, from petitioner's witness Burke (R. 298).

---

* *Ante*, p. 7.

Summarizing this point, it is respectfully submitted that because all other parts of the alleged oral agreement were reduced to writing on the day the agreement was made; because the presumption is that all that was agreed upon was encompassed in the writings; because of the evidence from an admittedly reputable witness and others that petitioner joined in declaring that all that had been agreed upon on June 24, 1937, was covered by the two writings prepared and signed that day; because of the admitted fact that no written or oral demand for any Sun stock purchased by John T. McLane after June 24, 1937, was made until nearly nine years later, when the value of Sun stock had risen; because of the discordant versions of the alleged agreement sworn to by the petitioner; because of the incredibility of the petitioner's asseveration that he remembers the two hour conversation in which the oral agreement is alleged to have been contained *verbatim;* because the conduct of the petitioner in not offering any of the 50 shares bought by him from Mrs. Mackey on April 9, 1943, to John T. McLane until two days before the suit was brought is inconsistent with the existence of any such contract as the petitioner now seeks to have enforced; because of the specific reasons for discounting and rejecting the testimony of the petitioner's corroborating witnesses; and because of the other impossibilities and improbabilities contained in the petitioner's evidence pointed out heretofore, it is respectfully submitted that the learned Trial Court's finding of fact that no oral contract was made on June 24, 1937, that if petitioner or John T. McLane should thereafter acquire any stock in The Sun Rubber Company he would offer half of it to the other at the price which he had paid for it, which finding was concurred in by a unanimous Court of Appeals, cannot be branded as "clearly erroneous" and that no "very obvious and exceptional showing of error" has been made,

particularly when due regard is given to the opportunity of the Trial Court to judge of the credibility of the petitioner, John T. McLane and the other witnesses who appeared before him.

II.

Petitioner Has Changed His Theory on Appeal and His New Theory Should Therefore Not Be Entertained.

Petitioner criticizes the learned Court of Appeals for applying the "clean hands" equitable maxim *"sponte sua"* on appeal, when in fact petitioner was himself responsible for that by changing his position from that upon which his trial counsel presented his case in the District Court. In the District Court petitioner's trial counsel took the position that there were three separate causes of action. One was for specific performance of the alleged oral agreement of June 24, 1937, that petitioner and John T. McLane would each offer to the other at cost half of all Sun stock thereafter acquired by him, which petitioner's trial counsel called a "parity" agreement (R. 126). The second cause of action was for an accounting of the trust created by the "Trust Agreement" of July 9, 1935, by Joseph L. McLane, Reed H. Albig and J. C. Peterson on account of alleged improper payments of taxes and expenses and dispositions of stock out of that trust (R. 127). The third was for an alleged loan of 6 shares of Sun stock (R. 132). Petitioner's trial counsel admitted that the issue regarding the alleged parity agreement was separate from that relating to the alleged breaches of trust. Thus petitioner's counsel at the trial said to the Court (R. 132):

> "It will be observed that this second cause of action is separate from the parity agreement, because even if the parity agreement didn't exist at

all, this cause of action exists with respect to the administration of the trust."

Subsequently, petitioner's counsel again informed the Trial Court (R. 516):

> *"Mr. Denby*: I repeat what I said before, Your Honor. There are two separate issues, really, in this case. The one issue is on the parity agreement. As to that, I concede that the banks are not involved. The other branch of the case, which hasn't been completed or even really gone into yet, is the accounting feature * * *."

Also showing that petitioner at the trial did not try to link the alleged oral agreement to divide future acquisitions of Sun stock with any breach of trust is his assertion that "the whole intent" of said alleged oral agreement "was to persuade Smith to come back to the Sun Rubber Company" (R. 209). Petitioner reiterated the same position elsewhere (R. 206, 207). "The consideration" for the agreement in dispute said petitioner's trial counsel "was that Mr. Smith should give up his position with General and return to the Sun Rubber Company" (R. 530), without mention of any alleged breach of trust. Petitioner was pictured by his trial counsel as a "star salesman" and capable executive whose services were indispensable to The Sun Rubber Company, and not as a pitiful beneficiary who dealt at a disadvantage with an overbearing trustee (R. 71, 531).

Petitioner also admitted at the conclusion of the trial that the only issue then before the Court "is a very simple and precise issue" (R. 520). That issue was then stated by petitioner's counsel as follows (R. 521-522):

> "We are faced here with that difficult thing, an oral agreement, and especially an oral agreement made a good many years ago. There is no dispute that there is nothing in writing, which spells out this agreement. Accordingly, we have the testi-

> mony of the plaintiff who says, 'We made this agreement', the testimony of the defendant that says, 'We did not make this agreement'."

Now, however, petitioner seeks to reverse his position and link the parity agreement with alleged breaches of the 1924 trust by John T. McLane, and it was this new argument that led the Court of Appeals to allude to the clean hands doctrine (R. 683, 174 F. 2d at 821). Petitioner thereby apparently seeks to transfer to John T. McLane the burden of proof on the question whether there was such an oral agreement made as petitioner seeks to have specifically enforced. It was not disputed in the District Court that the burden of proving the existence of that agreement was upon the petitioner. Thus, the first subdivision of argument in "Plaintiff's Trial Brief" furnished to the District Court after the trial was headed "The plaintiff has met the burden of proof of establishing the oral agreement and its breach." Under that heading petitioner said "In equity the burden of proof *upon the plaintiff* is no different from that which prevails at law." (Emphasis added.) In support of the last statement petitioner then quoted 8 *Standard Pennsylvania Practice* § 359 and from *Henry* on *Pennsylvania Trial Evidence* (3 ed.), pp. 638-640. Nowhere was any such theory advanced in the District Court as is now presented in petitioner's brief. With change of counsel for the petitioner in the Court of Appeals the theory of his case also changed.

The question whether petitioner and John T. McLane agreed on June 24, 1937, that each would offer to the other half of any Sun stock which he thereafter acquired at its cost to him, is, as petitioner's counsel admitted at the trial, wholly independent of any trust question. The stock in the trust was covered by the written "Distribution Agreement" (Exhibit 6, R. 147, 558). The alleged oral agreement sought to be specifically enforced

relates to stock of third parties which either petitioner or John T. McLane might thereafter purchase with his own funds.

The petitioner should not under well settled principles of appellate practice be permitted to change his theory on appeal by contending now that John T. McLane committed a breach of trust and that this shifts the burden of proof on the question whether an oral contract was made between petitioner and John T. McLane on June 24, 1937, that each would offer to sell the other half of any Sun stock he thereafter acquired at the price which he paid for it, which was the only issue left with the Trial Judge at the conclusion of the testimony, as petitioner's counsel then admitted, and which issue petitioner's own counsel then described as "a very simple and precise issue" (R. 520).

This Court has long and consistently held, as have other appellate courts, that it will not review a case on a different theory than that upon which it was presented to the trial court or consider a question which was not submitted to the trial court: *U. S. v. Le Baron,* 60 U. S. 73; *Thomas v. Taylor,* 224 U. S. 73, 84; *Dayton-Goose Creek Railway v. U. S.,* 263 U. S. 456, 486; *U. S. v. Atkinson,* 297 U. S. 157, 158-159; *Howitt v. U. S.,* 328 U. S. 189, 191-192, footnote 3. This rule has been expressly applied to prevent a plaintiff who had assumed the burden of proof at the trial from contending on appeal that the burden should have been carried by the defendant: *Kentucky Vermillion M. & C. Co. v. Norwich U. F. Ins. Soc.,* 146 Fed. 695, 702 (C.C.A. 9); *Spokane I. Fair Ass'n. v. Fidelity & Deposit Co.,* 15 F. 2d 48 (C.C.A. 9); *U. S. v. Peterson,* 34 F. 2d 245, 250 (C.C.A. 10); *Raiche v. Standard Oil Co.,* 137 F. 2d 446, 449 (C.C.A. 8).

The only alleged breach of trust by John T. McLane and by which it is sought to affect disposition of the question of fact whether such an agreement was made

as is sought to be specifically enforced was by his "pledging" 1634 shares of Sun stock to secure three McKeesport banks. There was no breach of trust by John T. McLane in pledging the stock to the banks, because 384 of those shares admittedly belonged to him personally and all rights in the remaining 1250 shares of McLane Co., Inc., and therefore of its stockholders, had ceased in 1932 (R. 73, 430, 619). The "pledging" was done solely by the "Trust Agreement" of July 9, 1935 (R. 53, 59-62, 133). Before July 9, 1935, John T. McLane had become the owner individually of the 1250 shares by the contract dated December 29, 1932, between him and McLane Co., Inc., Exhibit G (R. 430, 619), pursuant to which he endorsed and guaranteed the notes of that Company at the banks and gave a $50,000 mortgage on his individual real estate and in consideration whereof McLane Co., Inc., transferred to him its beneficial ownership in said 1250 shares. Petitioner stipulated that said contract had been authorized by the Board of Directors of McLane Co., Inc., (R. 476), and no question regarding the validity of that transfer was raised at any time during the trial. Petitioner himself as secretary signed the new certificate transferring the 1250 shares out of the name of "John T. McLane Trustee" and also a new certificate for those 1250 shares in 1934 (See certificates Nos. 139 and 261 in petitioner's Exhibits 8 and 10, R. 157, 163, 671-672). At the trial petitioner repeatedly took the position that what occurred before July 9, 1935, was not material and that the starting point so far as he was concerned was that date (R. 129, 430, 462-463). Petitioner also repeatedly took the position at the trial that it was no longer material whether the 1250 shares were issued to John T. McLane in trust for McLane Co., Inc., or its individual stockholders, because the distribution agreement (Exhibit 6, R. 147, 558) had settled the persons ultimately entitled to that stock (R. 73, 128, 463). John T. McLane testified that the

1250 shares were issued to him in trust for McLane Co., Inc. (R. 462-464), and that was confirmed by the written declaration of the trust made in 1929 (R. 54). Petitioner stipulated that the distribution agreement was a valid and binding legal agreement (R. 464), but it could not be that if the 1250 shares were held by John T. McLane in trust for the individual stockholders of McLane Co., Inc., because the three stockholders who entered into the distribution agreement patently could not eliminate the interests of other stockholders in the excess of the 1250 shares over the 1057 shares of McLane Co., Inc., then outstanding, as comparison of the distribution agreement (R. 147, 558) with Exhibit K (R. 470, 621) will demonstrate was in fact accomplished by the distribution agreement. In other words, the distribution agreement could only be valid if John T. McLane had previously become the complete owner of the 1250 shares and therefore had the right to put them in the trust of July 9, 1935, which reserved to him a general power of appointment over those shares after the banks had been paid. Accordingly, when John T. McLane first "pledged" the 1250 shares to the banks he was the sole owner of those shares and had the right to pledge them for his own obligations (though most of them were in fact for McLane Co., Inc., and some for The Sun Rubber Company, R. 350-357). The arguments in petitioner's brief based on a defaulting trustee who has violated his trust, therefore, have no basis in fact on this record.

Furthermore, the distribution agreement which petitioner signed, in its opening paragraph in effect ratifies the trust agreement of July 9, 1935, by providing that it should be carried out in accordance with its terms (R. 147, 558). Petitioner admitted that he agreed that the 1634 shares should remain pledged to the banks until their obligations had been fully discharged (R. 189). As secretary of The Sun Rubber Company peti-

tioner in 1935 signed the stock certificates transferring the 1250 shares to "Josie E. McLane and Joseph L. McLane Trustees and their Successors under Trust Agreement of July 9, 1935" (See certificates Nos. 289 and 290 of Exhibit 8, R. 157, 673-674). There can be no doubt, therefore, that petitioner agreed to the "pledging".

The only breaches of trust relied upon by the petitioner at the trial were those alleged to have been committed after June 24, 1937, by the trustees (of whom John T. McLane was never one) of the trust created by the instrument of July 9, 1935, and it was of that trust that the accounting was asked and granted (R. 42-43, 68-69, 518, 637). Petitioner admitted at the trial that the trust for which the 1250 shares had been originally issued to John T. McLane in 1924 was "A wholly different trust" than the one of 1935 (R. 324).

Petitioner's one-day "leaving" of The Sun Rubber Company's employment did not immediately follow his discovering the "pledging" of stock to the McKeesport banks, as one would think from petitioner's brief (p. 14). Two years elapsed between those two occurrences (1935 until 1937) and the events which immediately preceded his unsubstantial leaving were described by petitioner himself as several months of bickering over the manner in which The Sun Rubber Company's business should be conducted (R. 104, 110).

John T. McLane did not have any knowledge superior to the petitioner as to the owners of Sun stock, who would be the only persons from whom it could be acquired, or of the value of Sun stock. Petitioner has been Secretary and Treasurer of The Sun Rubber Company since 1928 (R. 52) and as such has had custody of the Company's stock transfer books (R. 180) and other records which would enable him to know at least equally as well as Mr. McLane who owned The Sun Rubber Company's stock and who might therefore have it for sale,

and what it was worth. Petitioner also had the distribution agreement (Exhibit 6, R. 147, 558), from which he could tell who had any beneficial interests in Sun stock and from whom, therefore, they might be bought. The petitioner, therefore, had at least as much knowledge as John T. McLane after June 24, 1937, where and at what price to buy Sun stock and the same opportunity to do so. Now, however, that Sun stock has risen greatly in value, petitioner would like to get half of the shares which his uncle bought at the comparatively favorable prices paid for them by his uncle years ago.

It is significant that no authority whatever is cited in petitioner's brief for his contention that any breach of trust allegedly committed by John T. McLane had the effect of shifting to him the burden of disproving that he had made an agreement with petitioner to divide future acquisitions of stock at cost or to prove that he had made a fair agreement with petitioner. No authority to support any such contention on the facts of the case at bar, we respectfully submit, can be found. No fiduciary relation existed between petitioner and John T. McLane on June 24, 1937, when the agreement of which specific performance is sought is alleged to have been made. No fiduciary relation or "trust principles" enter into the question whether petitioner and John T. McLane orally agreed on June 24, 1937, that each would sell to the other half of any Sun Rubber Company stock which he thereafter acquired at the same price which he had paid for it.

Petitioner's arguments based on his posing as a "wronged beneficiary" and John T. McLane maligned as a "violating trustee" should be rejected because they were not presented to the Trial Court, because they have no basis in fact, and because they are irrelevant to the only issue raised on appeal.

III.

Consideration of "Clean Hands" Maxim not Necessary.

The Court of Appeals did not pinion its decision to the equitable maxim that he who seeks the aid of a court of equity must come with clean hands. The paramount and self-sufficient reason for the affirmance by the Court of Appeals was that it concurred in the crucial finding of fact of the Trial Court that petitioner and John T. McLane did not orally agree on June 24, 1937, that each would offer to the other, at the price which he had paid for it, half of any stock in The Sun Rubber Company which he thereafter acquired. That the Court of Appeals regarded the finding of fact of the Trial Court that no such oral agreement had been made, since that finding could not be adjudged "clearly erroneous", as itself a sufficient reason requiring the affirmance of the judgment of the District Court appears from the concluding clause of the paragraph of the opinion of the Court of Appeals referring to the "clean hands" maxim. That clause is as follows (R. 684, 174 F. 2d at 822):

> "* * * nor can he [petitioner] prevail here under any theory, in view of the specific finding that no such agreement was made."

That the Court of Appeals based its affirmance on the finding of fact that no such agreement was made as is sought to be specifically enforced, irrespective of any other reasons, also appears from the summation of its opinion, which is as follows (R. 684, 174 F. 2d at 822):

> "* * * we must conclude that the critical finding of fact by the district judge, amply supported by credible evidence, is dispositive of this appeal. The judgment will accordingly be affirmed."

The reference by the Court of Appeals to the "clean hands" maxim was merely an additional reason for its

decision and wholly unnecessary. What the petitioner sought by his appeal to the Court of Appeals and what he now seeks by applying to this Court for a writ of certiorari, is specific performance of an alleged oral contract between him and John T. McLane that each would offer to the other at cost half of any Sun Rubber Company stock which he thereafter purchased. If the finding of fact that no such oral agreement was made is sustained, that is fatal to petitioner's case, without invoking other reasons. It is also unnecessary to consider the "clean hands" maxim because, as shown above*, there was no breach of trust by John T. McLane or any fiduciary relation between him and petitioner when the oral agreement sought to be specifically enforced is alleged to have been made. In referring to the "clean hands" maxim the Court of Appeals was merely proceeding *arguendo* on the hypothetical assumption that there had been a breach of trust by John T. McLane, as expressly appears from its opinion (R. 683, 174 F. 2d at 821).

Since the allusion by the Court of Appeals to the "clean hands" maxim was wholly unnecessary to its decision and its affirmance on the crucial question of fact whether an oral agreement such as is sought to be specifically enforced was made is sound, consideration by this Court of the questions sought to be raised by the petitioner regarding the "clean hands" maxim would be academic. This Court affirms a correct decision of a Court of Appeals even though this Court does not agree with the reasons given by the Court of Appeals: *Riley Investment Co. v. Commissioner,* 311 U. S. 55, 59. The denial of a certiorari does not even rise to the dignity of an affirmance and imports no expression of opinion upon the merits of the case: *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.,* 240 U. S. 251, 258; *U. S. v. Carver,*

---

* *Ante,* pp. 29-32.

260 U. S. 482, 490; *House v. Mayo,* 324 U. S. 42, 48; *Sunal v. Large,* 332 U. S. 174, 181.

IV.

Court of Appeals Correct Regarding "Clean Hands" Maxim.

While consideration of the questions sought to be raised by the petitioner regarding the "clean hands" maxim is unnecessary to a decision of this case, a brief of counsel should, we believe, cover those questions.

Petitioner contends first that the Court of Appeals had no right *"sponte sua"* to invoke the fundamental equitable maxim that he who seeks the aid of a court of equity must not himself have been guilty of any iniquity in the subject matter of the litigation. On the contrary, it is well settled that a Court of Appeals or this Court may *affirm* for any reason disclosed by the record, though it was not raised in or considered by the court below: *Collier v. Stanbrough,* 6 How. 14, 21; *Helvering v. Gowran,* 302 U. S. 238, 245; *LeTulle v. Scofield,* 308 U. S. 415, 421; *Riley Investment Co. v. Commissioner,* 311 U. S. 55, 59; *Park Lane Dresses v. Houghton & Dutton Co.,* 54 F. 2d 33, 37 (C.C.A. 1); *McBrine Co. v. Silverman,* 121 F. 2d 181, 182 (C.C.A. 9). *New York Life Ins. Co. v. Calhoun,* 114 F. 2d 526, and the other cases cited in petitioner's brief (p. 18) do not hold differently or sustain the petitioner's contention that the Court of Appeals erred in assigning an additional reason for its affirmance *"sponte sua"*. Those cases hold that an appellate court will not *reverse* on a ground which was not raised in the trial court. The Court below did not depart from that rule; on the contrary it is the petitioner who is trying to violate that rule by arguing the issue whether such an oral agreement as is sought to be specifically enforced was in fact made upon a different

theory on appeal than it was argued in the Trial Court. *Fountain v. Filson,* 336 U. S. 681, is in accord with the principle that an appellate court should not *reverse* on an issue not raised in the trial court. In *Fountain v. Filson* the only issue litigated in the District Court was whether there was a resulting trust in plaintiffs' favor. That issue was decided by the District Court in favor of the defendants and the Court of Appeals agreed with that decision, but went further and held that there was a personal liability on the defendants to repay the plaintiffs a certain sum of money, and directed the District Court to enter a personal money judgment for that amount in favor of the plaintiffs and against the defendants. To the extent that the Court of Appeals in that case went beyond affirming the judgment below it was clearly wrong, but finds no counterpart in the case at bar. If the Court of Appeals in *Fountain v. Filson* had simply affirmed the judgment of the District Court, as the Court of Appeals did in the case at bar, it is manifest from this Court's opinion that it would not have reversed.

The maxim that equity will not lend its aid to a suitor with unclean hands is such a fundamental principle for the protection of the court itself that it has been expressly recognized that a court of equity may invoke that maxim *sua sponte.* Thus in *American Ins. Co. v. Lucas,* 38 F. Supp. 926, affirmed in 129 F. 2d 143 (C.C.A. 8), app. dis. 314 U. S. 575, a three judge court in refusing equitable relief said (p. 934):

> "In applying the maxim requiring equity from one seeking equity the court is concerned primarily with the rights and duties of the parties inter sese. In applying the 'clean hands' maxim the court is concerned primarily with protecting its own integrity from improper action by a party. The former arises upon the pleading of a party (usually defendant`

against whom a fraud has been committed. The latter need not be even pleaded; may come to the attention of the court in any way; and the court will act sua sponte."

In *Precision Instrument Mfg. Co. v. Automotive M. Machinery Co.*, 324 U. S. 806, this Court in enforcing the clean hands maxim said (p. 815):

> "This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.'"

That the clean hands maxim was not pleaded or argued in the District Court does not prevent the Court of Appeals from invoking it: *Primeau v. Granfield*, 193 Fed. 911, 913 (C.C.A. 2); *Frank Adam Electric Co. v. Westinghouse E. & M. Co.*, 146 F. 2d 165, 167 (C.C.A. 8); *American Ins. Co. v. Lucas, supra.* The first of those cases was a bill in equity for an accounting between two men who had been engaged in the fraudulent sale of stock to third persons. The Court of Appeals dismissed the bill because of the plaintiff's unclean hands, notwithstanding that that principle had not been pleaded or argued by the defendant in the trial court, and even though it was third persons rather than the defendant who had been injured by the fraudulent transactions. The Court said (p. 913):

> "But from the very nature of the fundamental principles involved it is manifest that the question is deeper than one of pleading. The court must consider it not because it is a matter of defense to the defendant but because it is against public policy to hear the case if the charge be established. The court acts for its own protection rather than for the protection of the defendant. When fraud or illegality is disclosed in a case, public policy requires a

court to refuse its aid irrespective of the state of the pleadings and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief."

The applicability of the clean hands maxim was expressly argued orally before the Court of Appeals. Petitioner's counsel then had no satisfactory answer to the Court's inquiries regarding the applicability of that maxim, and this though the petitioner was accorded additional time beyond the ordinary for his oral argument.

Petitioner contends that the clean hands maxim does not apply to the case at bar because the agreement which he made on June 24, 1937, evidenced by the so-called "Distribution Agreement" (Exhibit 6, R. 147, 558), did not defraud John T. McLane since he agreed to it, but only third parties, viz., the other stockholders at that time in McLane Co., Inc. Whether the clean hands maxim bars a plaintiff's claim to specific performance affects the remedy for enforcement of the contract, and is therefore a procedural matter governed by the *lex fori*: *Watson v. Brewster,* 1 Pa. 381, 385. That the *lex fori* should govern is reinforced by the accepted principle that specific performance is an extraordinary remedy which is not of right but of grace, resting in the sound discretion of the equity court and that it will not be granted where there are circumstances rendering it inequitable: *Friend v. Lamb,* 152 Pa. 529, 533, 25 A. 577, 578; *Girard Mammoth Coal Co. v. Raven Run Coal Co.,* 275 Pa. 439, 443, 119 A. 495, 496; *Hennessy v. Woolworth,* 128 U. S. 438, 442. That the *lex fori* should govern the question whether the remedy of specific performance is barred by unclean hands also is consonant with the statements in *American Ins. Co. v. Lucas, supra,* and *Primeau v. Granfield, supra,* that a court invokes the clean hands maxim for its own pro-

tection. Petitioner's trial counsel admitted that it was the Pennsylvania Statute of Frauds, Statute of Limitations and doctrine of laches which apply to this case (R. 530, 533). If the Pennsylvania doctrine of laches applies, the Pennsylvania law respecting the clean hands doctrine should also apply, for they are both equitable doctrines affecting the question whether a remedy should be granted. Consequently, the Pennsylvania law determines the applicability of the clean hands doctrine.

It is clear that in Pennsylvania the clean hands doctrine applies even though it is a third person and not the defendant who was injured by the plaintiff's inequitable conduct. It has been repeatedly held in Pennsylvania that where the plaintiff conveyed his property to the defendant in order to defraud the plaintiff's creditors, the courts will not specifically enforce the defendant's agreement to reconvey the property to the plaintiff after the danger from the creditors had passed, or enforce any other contract which had for its object evasion of the plaintiff's creditors: *Hershey v. Weiting,* 50 Pa. 240; *Hukill v. Yoder,* 189 Pa. 233, 42 A. 122; *Smart v. Baroni,* 360 Pa. 296, 61 A. 2d 860; *Estate of Elke Dayen,* 97 Pa. Superior Ct. 250. In all of those cases it was not the defendant but only third persons who were injured by the plaintiff's misconduct. Nevertheless in every one of them relief was denied the plaintiff because he came into a court of equity with unclean hands.

It has also been held in Pennsylvania that an agreement between two lien creditors whereby one of them abstains from bidding at an execution sale of their debtor's property will not be enforced: *Slingluff v. Eckel,* 24 Pa. 472; *Barton v. Benson,* 126 Pa. 431, 17 A. 642. It is clear in those cases also that it was not the defendant who was injured. It was a third party, the debtor.

Reynolds v. Boland, 202 Pa. 642, 52 A. 19, is another case which clearly shows that the petitioner errs in stating that under Pennsylvania law "The wrong must have been done to the defendant himself and not to some third party" in order that the clean hands maxim may be invoked. Reynolds, Boland and one Stetler were organizing a corporation to mine coal on leases which belonged to Stetler and which he was to transfer to the new company. Animosity developed between Reynolds and Stetler to the extent that Stetler refused to proceed with the organization of the corporation unless Reynolds withdrew from it. Reynolds ostensibly withdrew by assigning his interest to Boland, but Boland agreed on June 3, 1899, that after the corporation had been formed he would transfer to Reynolds out of the stock issued to him (Boland) the number of shares which it was originally intended that Reynolds should get. Reynolds sued for specific performance of Boland's agreement to transfer the stock to him, but his bill was dismissed because of his unclean hands. In affirming the dismissal of the plaintiff's bill, the Supreme Court of Pennsylvania expressly recognized that it was not the defendant Boland who was wronged by the plaintiff, but a third party, Stetler. Thus, the Supreme Court of Pennsylvania said (pp. 649-650):

> "It is not pretended that, in the agreement of June 3, 1899, Reynolds and Boland tried to take advantage of each other, or that either was attempting any fraud upon the other. Its sole purpose was the deception of Stetler, to enable Reynolds to accomplish through it what was apparently impossible without it. But this does not relieve it from its baseness, and in it there is no equity for the plaintiff. . . . Stetler is to be wronged. The compact of June 3, 1899, was for that purpose. It is still executory, and equity frowns at the mere suggestion of its enforcement. Both parties to it are

> parties to its iniquity, and neither has any equity against the other. 'Who comes into equity must come with clean hands. In pari delicto melior est conditio defendentis. These are the principles which stand in the plaintiff's way. . . . Who does iniquity shall not have equity; equity has no relief for a party who, in the practice of one fraud, has become the victim of another.'"

None of the Pennsylvania cases cited in the petitioner's brief (p. 21) contains any statement to the effect that the injury must have been done to the defendant, rather than to a third person, in order that the clean hands doctrine apply. While in some of them the injury was in fact done to the defendant there is no holding that the clean hands doctrine is confined to such cases. We respectfully submit that those cases do not support petitioner's assertion (p. 21) that his quotation from 2 *Pomeroy's Equity Jurisprudence,* § 399, "represents the law in Pennsylvania as stated by its Supreme Court." The last seven Pennsylvania cases cited above in this brief affirmatively show that petitioner's assertion is erroneous.

While the Ohio law, we believe, is immaterial for the reasons outlined above*, we submit that there also the clean hands doctrine applies to cases in which the party wronged by the plaintiff's inequitable conduct was a third person, and not the defendant. It has been expressly held in Ohio, as in Pennsylvania, that a plaintiff who conveyed his property to the defendant in order to hinder, delay or defraud the plaintiff's creditors will not be aided by a court of equity in compelling the defendant to return the property to the plaintiff: *Pride v. Andrew,* 51 Ohio St. 405, 38 N. E. 84; *Kihlken v. Kihlken,* 59 Ohio St. 106, 51 N. E. 969; *Berner v. Dia-*

---

* *Ante,* pp. 39-40.

mond, 48 Ohio Law Abs. 505, 74 N. E. 2d 568. Third persons and not the defendant were the ones wronged in each of those cases.

Cody v. Landis, 68 Ohio App. 225, 40 N. E. 2d 209, is another Ohio case in which the clean hands maxim was applied, notwithstanding that the plaintiff's misconduct was designed to injure third parties and not the defendant. That was a suit for specific performance of a written contract for the sale of real estate. The purchase price specified in the sale agreement was $3,200 but plaintiff tendered only $2,025, contending that the latter was the price actually agreed upon and that the larger figure had been inserted in the sale agreement simply to assist him in borrowing more money on the security of the property or selling it at a greater profit than he could if the real purchase price had been stated in the agreement. Specific performance was refused, *inter alia,* on the ground that plaintiff was guilty of inequitable conduct which precluded him from relief by way of specific performance in a court of equity. The Court also held in this case that it could invoke the clean hands maxim *sua sponte,* saying (p. 231):

> "* * * this court, in the exercise of its appellate jurisdiction in the trial of chancery cases, may, either upon motion of a party, or *sua sponte,* dismiss a petition where consideration of all the pleadings reveals that the petitioner has no cause of action, or does not come into court with clean hands, and a petition may be dismissed on the latter ground irrespective of whether the defendant has invoked the clean hands maxim."

In the Federal Courts it is also true that the clean hands doctrine applies notwithstanding that the injury was to a third person and not to the defendant. It has been held by this Court, just as in Pennsylvania and Ohio, that specific performance will not be granted of

a contract made to defraud creditors: *Dent v. Ferguson,* 132 U. S. 50, 64. Other illustrations of cases in which this Court has applied the clean hands maxim notwithstanding that third persons and not the defendant were the injured ones are *Selz v. Unna,* 6 Wall. 327; *Manhattan Medicine Co. v. Wood,* 108 U. S. 218, and *Precision Instrument Mfg. Co. v. Automotive M. Machinery Co.,* 324 U. S. 806. In *Selz v. Unna, supra,* the plaintiff sought enforcement of an agreement that the defendant would not collect from him if he (plaintiff) did not defend a prior suit which the defendant had brought against four persons of whom the present plaintiff was one. Relief was denied, *inter alia,* because plaintiff's hands were not clean. The persons intended to be injured there were the other three defendants in the original action, and not the present defendant. Expressly recognizing that the clean hands maxim applies where third persons, and not the defendant, are the intended victims of the plaintiff's misconduct, this Court said (p. 336):

> "Parties are not only bound to act fairly in their dealings with each other, but they are not to expect the aid of a court of equity to enforce an agreement made with the intent that it shall operate as a fraud upon the private rights and interests of third persons."

In 2 *Pomeroy's Equity Jurisprudence* (5 ed.) § 401, the author contradicts the statement in Section 399 which is quoted in petitioner's brief (pp. 20-21) and upon which petitioner so heavily relies. In Section 401, still dealing with the clean hands maxim, Pomeroy says:

> "Upon the same principle, wherever one party, in pursuance of a prior arrangement, has fraudulently obtained property for the benefit of another, equity will not aid the fraudulent beneficiary by compelling a conveyance or transfer thereof to him; and gen-

> erally, where two or more have entered into a fraudulent scheme for the purpose of obtaining property in which all are to share, and the scheme has been carried out so that all the results of the fraud are in the hands of one of the parties, a court of equity will not interfere on behalf of the others to aid them in obtaining their shares, but will leave the parties in the position where they have placed themselves."

This quotation unquestionably refers to cases in which a third person, and not the defendant, has been injured by the fraud in which the plaintiff participated. In support of the last quotation Pomeroy cites *Reynolds v. Boland,* 202 Pa. 642, 52 A. 19, *supra,** which was a clear case of injury to a third person. What has been said herein about *Pomeroy's Equity Jurisprudence* applies to other texts on the subject as well.

Regardless of any conflict of laws question, it is clear that the equitable maxim that he who comes into equity must do so with clean hands applies to the case at bar notwithstanding that it was other stockholders of McLane Co., Inc., rather than John T. McLane, who were injured by the agreement entered into on June 24, 1937, between petitioner and John T. McLane. That most of the stockholders in McLane Co., Inc., were defrauded by the part of the agreement of June 24, 1937, reduced to writing in the "Distribution Agreement" (Exhibit 6, R. 147, 558), if petitioner were right that the 1250 shares of Sun stock issued to John T. McLane on October 15, 1924, were in trust for the individual stockholders of McLane Co., Inc. (which contention was abandoned by him at the trial, R. 73, 128, 462-463), can be seen by comparing said "Distribution Agreement" with the list of stockholders in McLane Co., Inc., on the same date (Exhibit K, R. 470, 621). If the 1250 shares of Sun

---

* *Ante,* p. 41.

stock were held in trust for the individual stockholders in McLane Co., Inc., each of the latter should have received that number of Sun shares which bore the same proportion to his stockholdings in McLane Co., Inc., as 1057 bears to 1250. Thus, W. H. Copeland should have been allotted 59 shares in the "Distribution Agreement" instead of the 50 actually allotted to him in that instrument (R. 558). In fact, however, each stockholder listed in the "Distribution Agreement", beginning with C. Albert Ball, was allotted only the same number of Sun shares as he had in McLane Co., Inc., thereby depriving him of his interest in the excess of the 1250 Sun shares over the 1057 McLane Co., Inc., shares then outstanding, and all of that excess went to the petitioner, who had only 118 McLane Co., Inc., shares but was awarded 327 out of the 1250 Sun shares. The learned Court of Appeals was therefore correct in stating that, if the facts were assumed to be as petitioner now asserts "plaintiff assuredly likewise committed a breach against the other beneficiaries of the trust" (R. 684, 174 F. 2d at 821). The clean hands maxim may therefore appropriately be applied to the case at bar, though it is unnecessary to do so to reach the same decision.

V.

Other Defenses.

There are also various other reasons, we respectfully submit, why the judgments of the two lower Courts are right. One of them is that, tested by the evidence as distinguished from the arguments of petitioner's counsel, the alleged contract is too indefinite for specific performance. As said by this Court in *Hennessy v. Woolworth,* 128 U. S. 438, 442, in affirming the refusal of specific performance on this ground, the extraordinary remedy of specific performance "should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt whether the party against whom relief is asked in fact made such an agreement." Such is also the law in Pennsylvania and Ohio: *Markovitz v. Markovitz,* 336 Pa. 136, 141, 8 A. 2d 42, 44; *Agnew v. Southern Avenue Land Co.,* 204 Pa. 192, 194, 53 A. 752, 753; *Beidler v. Davis,* 72 Ohio App. 27, 33, 50 N. E. 2d 613, 616; *Tickel v. Shock,* 80 Ohio App. 459, 463, 72 N. E. 2d 154, 156. Nowhere in this record is there any clear proof that petitioner and John T. McLane agreed that each would offer to the other half of all shares of Sun Rubber Company stock thereafter acquired by him at the price which he had paid for it. The petitioner's own testimony goes farthest but even in it there is no reference whatever to the price at which any such offer shall be made (R. 108-109). The price is an essential term without which there can be no enforceable contract: *Canister Co. v. Wood & Selick,* 73 F. 2d 312, 315 (C.C.A. 3), cert. den. 296 U. S. 590; *Bigley v. Risher,* 63 Pa. 152, 155; *McNeely v. Bookmyer,* 292 Pa. 12, 14-15, 140 A. 542, 543; *Stevens v. Doylestown B. & L. Ass'n.,* 321 Pa. 173, 174, 183 A. 922, 923. Other essential terms are also lacking. Other defenses are the Statute of Frauds contained in the Uniform Sales Act (Pennsylvania Act of 1915, P. L. 543,

§ 4, as amended 1925, P. L. 310, § 2; 69 PS §42)*; the Statute of Limitations (Pennsylvania Act of 1713, 1 Sm. L. 76; 12 PS §31)**; and the doctrine of laches. Because of the length which this brief has already attained, these other defenses are merely stated and not argued.

In conclusion, it is respectfully submitted that this family quarrel turns upon a question of fact and that there is nothing in it that justifies the granting of a writ of certiorari.

Respectfully submitted,

WILLIAM H. ECKERT,
Attorney for Respondents.

---

*"A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."

**"All actions of . . . contract . . . shall be sued or brought . . . within six years next after the cause of such actions or suit, and not after."

CERTIORARI DENIED